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IN THE

Supreme Court of the United States

OCTOBER TERM 1994

TOMMY ROSS ANDERSON,
SARAH JANE ANDERSON,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the forfeiture of property under Title 21 of the United States Code creates a double jeopardy bar to criminal prosecution based on the same conduct giving rise to the forfeiture.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, TOMMY ROSS ANDERSON and SARAH JANE ANDERSON, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 23, 1994 (rehearing denied May 11, 1994) affirming the District Court's denial of Petitioner's motion to dismiss on grounds of double jeopardy an indictment brought against Petitioners.

JERRY WAYNE TILLEY and SUSAN WELLS TILLEY are co-defendants in the pending indictment, were co-appellants in the Court of Appeals and are also petitioning this court of a writ of certiorari. Petitioners, TOMMY ROSS ANDERSON and SARAH JANE ANDERSON, hereby join in and adopt the entire petition for writ of certiorari filed by the Tilleys.

OPINIONS BELOW

The opinion of the United States Court of Appeals denying Petitioners' appeal is reported as follows:

> *United States of America v. Jerry Wayne Tilley, Susan Wells Tilley, Tommy Ross Anderson and Sarah Jane Anderson*, 18 F.3d 295 (5th Cir. 1994).

This opinion may be found in Appendix A of this petition. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is found at Appendix B.

The unreported opinion of the United States District Court for the Northern District of Texas denying Petitioners' motion to dismiss the charges against them based on double jeopardy is found at Appendix C.

JURISDICTION

The Court of Appeals affirmed the judgment of the District Court on March 23, 1994. Rehearing was denied on May 11, 1994.

This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....

STATEMENT OF THE CASE

(i) Procedural History

On July 25, 1991, the government filed a complaint for forfeiture and obtained an order for warrant of arrest of property against certain real and personal property belonging to Petitioners TOMMY ROSS ANDERSON and SARAH JANE ANDER-

SON. Petitioners subsequently filed a claim for seized property and an answer to the complaint. The government later amended its request for order for warrant of arrest and filed its first amended complaint for forfeiture. Petitioners filed an amended answer. On February 9, 1993 Petitioners and the government executed a stipulated forfeiture of certain of the properties and on February 9, 1993, the District Court entered an order forfeiting properties belonging to Petitioners to the government.

On October 8, 1992, Petitioners were indicted, along with co-defendants, JERRY WAYNE TILLEY and SUSAN WELLS TILLEY, in the District Court for various drug offenses. The indictment was based on the same acts that gave rise to the forfeiture of their property.

On April 9, 1993 Petitioners filed defendants' plea of double jeopardy. On April 16, 1993 the government responded to this plea. On April 27, 1993 the District Court entered a Memorandum Order denying Petitioners plea of double jeopardy and refused to dismiss the indictment. On the same date, the District Court found the appeal to be a non-frivolous appeal and stayed the proceedings pending the outcome of an appeal to the United States Court of Appeals. Appeal was pursued to the Court of Appeals and on March 23, 1994 a panel of the United States Court of Appeals affirmed the opinion of the District Court. On May 11, 1994, the Court of Appeals denied Petitioners' petition for rehearing and suggestion for rehearing en banc.

(ii) Statements of Facts

Petitioners are accused by indictment of various charges involving violation of the narcotics laws. The indictment also charges co-defendants, JERRY WAYNE TILLEY and SUSAN WELLS TILLEY with similar violations. Prior to being indicted on this case, the government moved to forfeit various real and personal property belonging to Petitioners on the basis that this property was subject to forfeiture because it was utilized in drug trafficking, was proceeds from the sale of illegal drugs or

was traceable to such proceeds. The basis for the forfeiture are the same facts which form the basis of the indictment in this case.

The forfeiture suit has been settled and a final judgment entered. The trial of the indictment in this case was stayed pending the resolution of this appeal.

RESTATEMENT OF QUESTION PRESENTED

Whether the forfeiture of property under Title 21 of the United States Code creates a double jeopardy bar to prosecution based on the same conduct giving rise to the forfeiture.

REASONS FOR GRANTING THE WRIT

The Court of Appeals opinion in this case is in conflict with the following two opinions from this court:

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)

Austin v. United States, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)

Additionally, the question of whether forfeiture of property under Title 21 of the United States Code constitutes a double jeopardy bar to criminal prosecution based on the same conduct giving rise to the forfeiture has not been directly addressed by the Supreme Court. Since the Supreme Court issued its decision in *Halper*, state and federal courts from around the country have actively grappled with this issue. The Court strongly indicated in *Austin* what the proper outcome would be. However, even in the aftermath of *Austin*, various courts around the country have come to differing conclusions. The question raised in this petition is an important question of federal law which has not been, but should be, settled by the Supreme Court.

I. The Double Jeopardy Clause, *Halper* and *Austin*

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." United States Constitution, Amendment V. This clause of the Fifth Amendment protects against three abuses: 1. a second prosecution for the same offense after acquittal; 2. a second prosecution for the same offense after conviction; and 3. multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 656 (1969). The Double Jeopardy Clause is also intended to prevent the government from subjecting a defendant to undue expense, embarrassment, ordeal and anxiety. *Crist v. Bretz*, 437 U.S. 28, 38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); *United States v. Dinitz*, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

The defendant in *Halper* was convicted in a criminal prosecution of submitting false claims to the government, sentenced to prison, and fined. The government then brought suit against the defendant seeking up to $130,000.00 in civil penalties for the same conduct. The Court barred the government on double jeopardy grounds from collecting any penalties disproportionate to its actual cost arising from *Halper's* fraud. 109 S.Ct. at 1903-1904. The *Halper* decision was based on the fact that "civil proceedings may advance punitive as well as remedial goals"and that the "notion of punishment cuts across the division between the civil and the criminal law." *Id.* at 1901. The *Halper* court recognized that "a civil sanction, *in application*, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 1899. In other words, a "civil as well as criminal sanction constitutes punishment when the sanction *as applied in the individual case* serves the goals of punishment." *Id.* at 1901-1902. If the compensation extracted from a defendant in a civil proceeding greatly surpasses the remedial justice to which the government

is entitled, then that compensation becomes clear injustice if the "supposedly remedial sanction far exceeds the government's damages and actual costs." *Id.* at 1901.

Austin somewhat altered the *Halper* analysis as it applied to forfeiture cases. Although *Austin* dealt specifically with a claimed Eighth Amendment excessive fine violation, the court's discussion of the meaning of "punishment" and "remedial" gave further guidance as to when the double jeopardy clause may prohibit pursuing criminal prosecutions following the forfeiture of property.

In *Austin* the Defendant plead guilty under South Dakota law to possession of cocaine with intent to distribute. The United States then instituted forfeiture proceedings in federal court under Title 21 of the United States Code against Austin's mobile home and auto body shop where the drug transaction occurred. *Austin*, 113 S.Ct. at 2803. Austin claimed that the excessive fines clause of the Eighth Amendment applied to forfeitures. The Supreme Court agreed. In reaching this conclusion; the Court explored the history of forfeitures to determine if a forfeiture under Title 21 would be considered punishment.

The court in *Austin* concluded that forfeitures generally are punishment, *Id.* at 2810, and that in particular forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) are punishment, *Id.* at 2812. *Austin*'s conclusion that forfeitures are always considered punishment for constitutional purposes altered the *Halper* analysis in the forfeiture context. Since under *Austin* forfeitures are always considered punishment, whether they are excessive is not a necessary element to be established. While the fixed fine context of *Halper* required a showing of excessiveness in order to establish that the fine was punishment for constitutional purposes, the same is not true of forfeitures. Under *Austin*, forfeitures are always punishment without regard to whether the forfeiture is excessive or exceeds the reasonable costs and

expenses to the government in determining and prosecuting the offense.

The analysis in *Austin* applies directly to the question of whether the forfeiture of Petitioners' property will constitute a double jeopardy bar to their prosecution on the criminal indictment. *Halper* made clear that it violates the Fifth Amendment to prosecute both the criminal case and separately seek some other sanctions so long as the other sanction can be characterized as punishment. Under *Austin*, the forfeiture in the case at bar is clearly punishment.

In *Austin*, the Court explained that forfeitures have historically been considered as punishment. This common law principle has been carried forward into modern forfeiture statutes as evidenced by the legislative history and purpose of Title 21 forfeitures. As further evidence of the intent of the forfeiture statutes to punish criminal conduct, the court discussed the innocent owner defense under Title 21, stating:

> If forfeiture had been understood not to punish the owner there would have been no reason to reserve the case of a truly innocent owner. Indeed it is only on the assumption that forfeiture serves in part to punish that the court's past reservations of that question makes sense. *Id.* at 2809.[1]

21 U.S.C. § 881(a)(4) and (a)(7), the statutes addressed directly in *Austin* have a specific innocent owner defense. Likewise, 21 U.S.C. § 881(a)(6), the specific statute at issue in this case, has an innocent owner defense.[2]

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[1] The innocent owner defense under 21 U.S.C. § 881(a)(6) states: " ... except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

[2] *See also, United States v. A Parcel of Land, Buildings, Appurtenances and Improvements Known as 92 Buena Vista Avenue, Runson, New Jersey*, __U.S. __, 113 S.Ct. 1126, __L.Ed.2d __ (1993) (claimant who owned house

The court in *Austin* also found it significant that Congress, in enacting the Title 21 forfeiture provisions chose to tie the forfeiture directly to the commission of drug offenses. As explained in *Austin*, these statutes focus directly on the culpability of the owner. This was further evidence of the intent of these statutes to serve the goal of punishment.

Forfeiture, as explained in *Austin*,

> is a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing law. citing *U.S. v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). *Id.* at 2812.

Since under *Halper* a penalty that cannot be correlated to the damages sustained by society or the cost of enforcing the law is considered punishment, the *Austin* opinion recognizes forfeiture as always being punishment. In fact, the court in *Austin* made this clear in its conclusion that:

> We, therefore conclude that forfeiture under these provisions constitutes payment to a sovereign as punishment for some offense, ... and as such, is subject to the limitations of the Eighth Amendment's excessive fines clause. *Id.* at 2812.

Likewise, since forfeiture under 21 U.S.C. § 881(a)(6) is a payment to a sovereign as punishment for some offense, it is subject to the Fifth Amendment's double jeopardy clause.[3]

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allegedly purchased with proceeds of illegal drug transactions was entitled to invoke and offer evidence to support innocent owner defense under 21 U.S.C. § 881(a)(6).

[3] *See also, Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, No. 93-144 (June 6, 1994) (tax on possession of illegal drugs assessed after state has imposed criminal penalty for same conduct violates double jeopardy. The tax is punitive. Court stated that even though "taxes are usually motivated by revenue raising rather than punitive purposes, there is a distinction with "fines, penalties, and forfeitures which are readily characterized as sanctions."

II. The Court of Appeals Opinion

Although the Court of Appeals had the benefit of both *Halper* and *Austin* prior to rendering its decision, it nevertheless found that the forfeiture of Petitioners' property was not punishment and that no double jeopardy bar to the criminal indictment was created.

The Court of Appeals initially rejected the conclusion of *Austin* that forfeitures are always punishment. The court concluded that the forfeiture of proceeds of drug activity under 21 U.S.C. § 881(a)(6) is not punishment for double jeopardy purposes.

Secondly, the Court of Appeals applied the *Halper* proportionality test to the forfeiture in this case concluding that the forfeiture was not excessive and thus did not constitute punishment.

a. The Court of Appeals erred in not accepting the conclusion of *Austin* that forfeitures will always constitute punishment.

In the opinion of the Court of Appeals, the reasoning of *Austin v. United States* does not apply when the property being forfeited constitutes proceeds of the illegal activity. Throughout the opinion the court fails to distinguish between proceeds and property traceable to proceeds. However, despite the court's failure to recognize this distinction, it is still clear that the reasoning of *Austin* applies to the forfeiture in this case and a double jeopardy bar is raised by the forfeiture of Appellants' property.

The key distinction between *Austin* and *Halper* is that *Austin* eliminated the need to engage in a balancing test to determine if the forfeiture of property was disproportionate to the costs to the government in prosecuting the offense. Under *Austin*, forfeitures under the drug statutes are punishment and therefore the forfeiture of property will raise a double jeopardy

bar to criminal prosecution. There is no distinction under *Austin* between proceeds of an offense and instrumentalities and the Court of Appeals erred in devising this illusory distinction.

A close reading of *Austin* will demonstrate that it answers the questions raised in this appeal in a manner directly contrary to that of the Court of Appeals' opinion. As *Austin* makes clear, forfeiture under the drug statutes is punishment. The *Austin* court stated:

> We therefore conclude that forfeiture under these provisions constitutes payment to a sovereign as punishment for some offense, *Browning-Ferris*, 492 U.S. at 265, and, as such, is subject to the limitations of the Eighth Amendment's excessive fine clause.

The court in *Austin* did not recognize a distinction between forfeiture of proceeds or property traceable to proceeds and forfeiture of instrumentalities. Forfeiture of both constitutes punishment.

Austin eliminated the question of the excessiveness of the forfeiture from the analysis as to whether a forfeiture is punishment. Forfeitures are always punishment under *Austin* and whether they are excessive is a completely separate question that has nothing to do with the double jeopardy analysis.

The Court of Appeals not only ignores this holding of *Austin* but went the completely opposite direction in finding that the forfeiture of proceeds can never be punishment. There is no support in the law for the Court of Appeals' conclusion and in fact, it is directly contradicted by *Austin*.

Moreover, there is nothing in the history or purpose of 21 U.S.C. § 881(a)(6), the proceeds forfeiture statute, which supports a conclusion that the *Austin* reasoning does not apply. First, this provision, like the specific provisions at issues in *Austin*, contains an innocent owner defense. The inclusion of the innocent owner defense in § 881(a)(6), like that contained

in § 881(a)(4) and (a)(7) evidences a congressional intent to punish only those involved in drug trafficking by forfeiting their property. As the court recognized in *Austin*, this is evidence of the punitive nature of these provisions.

Additionally, the Fifth Circuit Court of Appeals has previously considered 21 U.S.C. § 881(a)(6) and concluded that the forfeiture of proceeds under that statute could not "seriously be considered anything other than an economic penalty for drug trafficking." *See Wood v. U.S.*, 863 F.2d 417, 421 (5th Cir. 1989). The Court of Appeals in the case at bar has characterized this same statute as being "wholly remedial." The contrary opinion in *Wood* is consistent with *Austin* while the opinion in this case is contrary to *Austin*. Clearly, the Court of Appeals was correct in *Wood* when the proceeds forfeiture statute was characterized as punishment.[4]

b. The Court of Appeals erred in failing to distinguish between proceeds of illegal activity and proceeds traceable to illegal activity.

In the Court of Appeals opinion, there is no distinction drawn between proceeds of illegal activity and forfeiture of property that is merely traceable to proceeds of illegal activity. This distinction is crucial under the facts of this case.

The forfeitures in this case were based, in part, on 21 U.S.C. § 881(a)(6), which states:

> (6) All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all monies, nego-

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[4] In *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29 (2d Cir. 1992), the court implied that the forfeiture of proceeds of a drug offense does raise a double jeopardy question. This case preceded *Austin*.

> tiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . . .

It is clear that under Section 6, a wide variety of factual circumstances could be present where property could be forfeited. Section 6, in fact, lists three distinct categories of forfeitable property:

1) Items furnished or intended to be furnished by any person in exchange for a controlled substance
2) Proceeds traceable to such an exchange, and
3) Items used or intended to be used to facilitate such a violation.

The variety of circumstances where forfeiture can occur under this section is obvious. For instance, money paid directly to a Defendant in exchange for illegal drugs could be forfeited under this section. On the other hand, a small amount of illegally derived money mixed with other assets and used to purchase real estate could make the entire real estate subject to forfeiture. *See, United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327 (5th Cir. 1990); *United States v. Banco Lafetero Panama*, 797 F.2d 1154 (2nd Cir. 1986); *Application of Kingsley*, 614 F.Supp. 219 (D.Mass.1985). Additionally, money, negotiable instruments and securities used or intended to be used in the drug transaction can be forfeited. The failure to distinguish between these varied circumstances undercuts the tenuous logic of the Court of Appeals' opinion.

The basic premise of the court's opinion is that forfeiture of proceeds does not take from the wrongdoer anything that he is entitled to. However, this is certainly not true of the forfeiture of property traceable to the proceeds. When property is traceable to the proceeds of illegal activity factual issues arise as to the extent that illegal funds have gone to the purchase of the property. To say that in all circumstances the wrongdoer has no

right to the property is not the same when dealing with property traceable to proceeds as it is with the proceeds themselves.

The Court of Appeals compared the forfeiture of the houses and vehicles in this case to bank robbery funds. The analogy is clearly improper. The bank robbery funds belong to somebody else. Here the houses and vehicles belong to the Petitioners. Moreover, the houses and vehicles here are not the direct fruit or proceeds of illegal activity like the bank robbery funds.

The Court of Appeals opinion has erroneously concluded that forfeitures under the proceeds statute can never be punishment. In fact, in many situations, if not all situations, this type of forfeiture is punishment. The Court of Appeals sweeping pronouncements to the contrary are directly contradicted by *Austin*.

c. Even if the *Halper* analysis applies, the Court of Appeals has improperly applied it.

While largely ignoring the ruling of *Austin*, the Court of Appeals looked back to *Halper* as establishing the test for determining if the forfeitures in this case constitute punishment. While Appellants contend that *Austin* rather than *Halper* controls in this case, the court has nevertheless misapplied *Halper*. The fatal flaw in the Court of Appeals application of *Halper* was in its method of finding that the forfeitures in this case were not so excessive as to make them punitive. In reaching this conclusion, the methodology of *Halper* itself was ignored.

The *Halper* court recognized that "a civil sanction, *in application*, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 1899. In other words, a "civil as well as criminal sanction constitutes punishment when the sanction *as applied in the individual case* serves the goals of punishment." *Id.* at 1901-1902. If the compensation extracted from a Defendant in a civil proceeding greatly surpasses the remedial justice to which

the government is entitled, then that compensation becomes clear injustice if the "supposedly remedial sanction far exceeds the government's damages and actual costs." *Id.* at 1901.

The Court of Appeals, in its *Halper* analysis, states that the "revenue from illegal drug sales and the cost to the government and society are incapable of exact measurement." However, the court's opinion went on to make broad assumptions concerning the costs to society of illegal drug sales. Based on these assumptions the court concluded that the forfeitures in this case were not so excessive as to constitute punishment for double jeopardy purposes.

This broad consideration of societal costs is inconsistent with *Halper*. Under *Halper* the question is whether the civil sanction "exceeds the government's damages and actual costs." Moreover, this broad approach to considering the societal costs of drug trafficking is inconsistent with other Circuits interpretation of *Halper*. For instance, in *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29 (2nd Cir. 1992), the court held that where a question is raised as to whether forfeiture under the drug statutes is punitive in nature, the government may show that the forfeiture serves legitimate civil goals by presenting its cost of investigation and detection, as well as other costs and damages attributable to the criminal misconduct of the claimant.

It is clear that the focus on governmental costs is on the costs in the prosecution of the Defendant in the particular case. A generalized assessment of the costs to the government or society in fighting the distribution of illegal drugs is not the inquiry required by *Halper*.

Even if the Court of Appeals' opinion that *Halper* still controls this case rather than *Austin* is correct, the court has still erred in misapplying *Halper*. The government must prove their costs and the court cannot just presume the facts in the government's favor. The Court of Appeals has simply ignored the

evidentiary standard of *Halper* in reaching a conclusion supporting the government.

III. Contrary Authority From Other Courts

At least two opinions from state appellate courts have disagreed with the conclusion of the Court of Appeals in this case. In *Danny Fant v. State of Texas*, ___ S.W.2d ___ (Tex. App. - Houston [14th Dist.], July 21, 1994, No. A14-94-00013, 1994 W.L. 377748) the court found double jeopardy to bar the Defendant's trial for possession of a controlled substance with intent to deliver after the state had obtained a forfeiture judgment arising out of the same criminal occurrence.

Fant was arrested and charged with possession of a controlled substance with intent to deliver in Texas state court. Three days later the state initiated forfeiture proceedings against him. Fant and the state then entered into an agreed judgment whereby Appellant forfeited $3,823.00 in United States Currency and one cellular telephone. Relying upon *Halper*, *Austin* and *Kurth Ranch*, the Court of Appeals found that the forfeiture of Fant's property created a double jeopardy bar to his criminal prosecution based on the same conduct. This conclusion was based on both the United States and Texas constitutions double jeopardy clauses with the court finding that they were conceptually identical. The forfeiture was pursued under the Texas state forfeiture statute which the court in *Fant* found to be similar to the federal statute.

The *Fant* opinion is directly contrary to the Court of Appeals opinion in the case at bar. While the *Fant* court does not characterize the money and cellular telephone forfeited in that case as "proceeds" or "instrumentalities" the opinion makes clear that double jeopardy applies to forfeitures of both. Moreover, it appears that the money forfeited, which was the bulk of the forfeiture in *Fant*, was "proceeds."

In *State of Louisiana v. 1979 Cadillac Deville and $24.00 U.S. Currency Seized From Frank L. Wilson*, 632 So.2d 1221 (La.App. 2 Cir. 1994) the Louisiana Court of Appeals also issued an opinion contrary to that in the case at bar. In the Louisiana case, the officer observed Wilson driving the 1979 Cadillac above the speed limit. The officer began pursuit and then saw Wilson throw a plastic bag from the vehicle. After Wilson was stopped, the officers retrieved the plastic bag which contained cocaine. Cocaine was also found in the vehicle.

Wilson entered a guilty plea in Louisiana state court to possession of cocaine with intent to distribute. He was sentenced to one-year imprisonment. The state also filed a forfeiture petition seeking forfeiture of the vehicle. The petition alleged that the vehicle was used to facilitate the possession, transportation and concealment of cocaine. Wilson argued that the forfeiture of his vehicle would constitute double jeopardy because of his previously imposed punishment for the same conduct.

Relying on *Halper* and *Austin* the Louisiana Court of Appeals found that the forfeiture of the vehicle would constitute double jeopardy. The court stated that the forfeiture of the automobile does constitute punishment. After an extensive discussion of *Austin*, the Louisiana court concluded that forfeiture of items that are not contraband per se is punishment and the double jeopardy clause applies.

While the forfeiture in the Louisiana case was based on the vehicle being an instrumentality of the drug offense, it is clear that the reasoning employed would also apply double jeopardy under the facts of the case at bar. The Louisiana court found that forfeiture of contraband per se, i.e., items that are illegal to possess; is not punishment implicating double jeopardy considerations. However, the items forfeited in the case at bar, houses and automobiles, are not contraband per se. It is not illegal to possess them. Therefore the forfeiture of those items would

constitute punishment and raise a double jeopardy bar to the criminal prosecution in the case at bar.

The opinions from the Texas and Louisiana Court of Appeals are inconsistent with the Fifth Circuit opinion in this case. Under the opinion of either of these state courts, the facts in the case at bar raise a valid double jeopardy claim. Likewise, under the interpretation given *Austin* and *Halper* by the Fifth Circuit Court of Appeals, the facts in the Texas and Louisiana cases would not raise double jeopardy. The uncertainty left in the wake of *Austin* and *Halper* will continue to create this divergence of opinion until the Supreme Court clearly determines the scope of double jeopardy protection in regards to the forfeiture of property.

IV. Failure to hold evidentiary hearing.

In applying the *Halper* analysis, the Court of Appeals made factual findings in favor of the government that were not made by the District Court. In fact, no *Halper* factual findings were made by the District Court since no evidentiary hearing was held.

Moreover, the Court of Appeals has made factual findings that are different from that of the District Court on the question of whether the property was "proceeds" or "instrumentalities." The District Court specifically found the property to be "instrumentalities"in finding no double jeopardy bar to the prosecution. Citing *U.S. v. McCaslin*, 959 F.2d 786, 788 (9th Cir.), *cert. denied*, _____ U.S. _____, 113 S.Ct. 382 (1992), the District Court stated:

> *Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. The forfeiture of such instrumentalities is "independent of, and wholly unaffected by any criminal proceeding in personam." (District Court Memorandum Order, page 4)

On appeal, the Petitioners argued that they were entitled to an evidentiary hearing in order to determine whether the property was instrumentalities as it was characterized by the District Court. However, the Court of Appeals denied this evidentiary hearing, characterized the property as proceeds, and found their forfeiture not to constitute punishment. Thus the Court of Appeals has found the property to be "proceeds," when the District Court found them to be "instrumentalities." Whether the property is instrumentalities or proceeds and the extent to which illegal activity has tainted the property can only be resolved in an evidentiary hearing.

The conclusion of the Court of Appeals that Petitioners waived the argument that the forfeited property was anything but proceeds is not supported by the record. In fact, Petitioners requested that the Court of Appeals remand the case for a hearing at which evidence could be presented to establish whether the forfeited property was instrumentalities or proceeds.

The District Court's memorandum order denying the motion to dismiss recognized that the government's forfeiture petition alleged that the property was subject to forfeiture under both 21 U.S.C. § 881(a)(6) and (a)(7). What was the true basis for the forfeiture has never been resolved.

Based on the failure of the District Court to hold an evidentiary hearing on any of these questions, Petitioners pray that the court summarily grant this petition and remand the case with instructions that an evidentiary hearing be held. Petitioners would point out that if an evidentiary hearing demonstrated that the District Court was correct in characterizing the forfeited property as instrumentalities, much of the reasoning of the Court of Appeals opinion would be undercut. Likewise, the actual evidence presented at a *Halper* hearing may necessarily contradict the Court of Appeals weighing of the *Halper* factors in favor of the government. This request is in the alternative to the request that the court find that double jeopardy has been estab-

lished and that an order of dismissal be entered and in no way is intended to waive that argument.

CONCLUSION

The question raised in this petition is an important question of federal law that should be addressed by the Supreme Court. The Court of Appeals in this case has issued an opinion in conflict with authority from the Supreme Court. Additionally, other courts from around the country have issued decisions in conflict with the Court of Appeals decision in this case. For these reasons, Petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was forwarded to Mr. Stewart Robinson and Mr. Mike Snipes, Assistant United States Attorneys, 1100 Commerce Street, 3rd Floor, Dallas, Texas 75242, (214) 767-0951, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, on this the 8th day of August, 1994.

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U.S. v. TILLEY
Cite as 18 F.3d 295 (5th Cir. 1994)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jerry Wayne TILLEY, and Susan Wells Tilley, Tommy Ross Anderson and Sarah Jane Anderson,
Defendants-Appellees.

No. 93-1394.

United States Court of Appeals,
Fifth Circuit.

March 23, 1994.

Rehearing and Suggestion for Rehearing En Banc Denied May 11, 1994.

Defendants charged with selling illegal drugs moved for dismissal based on prior civil forfeiture of proceeds from these drug sales. The United States District Court for the Northern District of Texas, A. Joe Fish, J., denied defendants' motion to dismiss, and defendants filed interlocutory appeal. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that civil forfeiture of proceeds from sales of drugs was not "punishment" and,thus double jeopardy clause did not bar subsequent criminal prosecution of defendants for illegal sale of drugs.

Affirmed.

1. Estoppel 68(2,4)

On appeal of trial court's refusal to dismiss drug trafficking charges, defendant's argument that personal property forfeited in civil action was proceeds of illegal drug trafficking or directly traceable thereto waived any argument that forfeited property was anything but such proceeds, even though civil complaint also sought forfeiture on grounds that property was used in trafficking. Comprehensive Drug Abuse Prevention and Control Act of 1970, §511(a)(6,7), 21 U.S.C.A. § 881 (a)(6,7).

2. Double Jeopardy 5.1

Double jeopardy clause prohibits more than one "punishment" for same offense. U.S.C.A. Const. Amend. 5.

3. Double Jeopardy 21

Regardless of order of civil and criminal proceedings predicated on same offense, double jeopardy clause will bar second sanction if both first and second sanctions are deemed punishment. U.S.C.A. Const. Amend.5.

4. Double Jeopardy 25

Civil forfeiture of proceeds from sale of drugs was not "punishment"and, thus, double jeopardy clause did not bar criminal prosecution of defendants for illegal sale of drugs; civil forfeiture served remedial purpose of reimbursing government and society for costs involved in drug trafficking, was not excessive in comparison with those costs, and did not even fully compensate government and society because forfeiture constituted only portion of proceeds which defendants' drug operation produced. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(a)(6), 21 U.S.C.A. § 881 (a)(6); U.S.C.A. Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

5. Double Jeopardy 25

Possessor of proceeds from illegal drug sales has no reasonable expectation that law will protect, condone, or even allow, continued possession of such proceeds; thus, civil forfeiture of such proceeds does not constitute "punishment" for purposes of double jeopardy clause. Comprehensive Drug Abuse Prevention and Control Act of 1970, §511(a)(6), 21 U.S.C.A. §881(a)(6); U.S.C.A. Const. Amend. 5.

Gerald H. Goldstein, John Fahle, Goldstein, Goldstein & Hilley, San Antonio, TX for Jerry Tilley.

Martin L. LeNoir, Dallas, TX, for Tommy Anderson.

Barry Sorrels, Milner, Goranson, Sorrels, Udashen, Wells & Parker, Dallas, TX for Sarah Anderson.

Tim K. Banner, Robert A. Montserrat, Dallas, TX, for Susan Tilley.

Jim E. Lavine, Houston, TX, for amicus TX. Crim. Defense Lawyers Ass'n and Nat'l Ass'n of Criminal Defense Lawyers.

Micheal Snipes, Delonia A. Watson, and Stewart C. Robinson, Jr., Asst. U.S. Attys., Richard H. Stephens, U.S. Atty., Dallas, TX, for U.S.

Appeals from the United States District Court for the Northern District of Texas.

Before JOHNSON, JOLLY and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this appeal, the defendants seek dismissal of their criminal indictment for selling illegal drugs on grounds of double jeopardy. They argue that the prior civil forfeiture of the proceeds from these drug sales constitutes punishment for the crimes charged in the indictment and that the Double Jeopardy

Clause precludes a second punishment. The district court, refusing to buy into the defendant's double jeopardy argument, denied their motion to dismiss the indictment. The defendants then filed this interlocutory appeal. Because we hold that the forfeiture of unlawful proceeds of illegal drug sales does not constitute punishment, we affirm the district court.

I

[1] In 1990, the Drug Enforcement Agency, and other authorities, began an investigation of large-scale activities involved in this case, which had yielded millions of dollars in drug proceeds. On July 25, 1991, the government filed a complaint for civil forfeiture *in rem* against certain personal and real property belonging to the defendants pursuant to 21 U.S.C. §§ 881(a)(6) and (a)(7).[1] On October 8, 1992, the government issued a criminal indictment charging the defendants for the various drug crimes committed from 1986 to 1991. On Febru-

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[1] The relevant subsections provide in part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All money, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter...

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter...

21 U.S.C. §§(a)(6) and (a)(7) (1988).

The government alleged that the personal property forfeited was either the cash proceeds of drug sales or traceable to those proceeds.

ary 5, 1993, the four defendants in this case entered into a stipulated forfeiture agreement with the United States. They agreed to forfeit significant amounts of cash, certificates of deposit, automobiles, and other personal property with a total value of approximately $650,000. Based on the stipulated agreements, the district court, on February 8, entered final judgment of forfeiture with respect to the personal property; however, the court stayed forfeiture proceedings with respect to defendants' two homes pending outcome of the criminal trial.[2] On April 7, the defendants filed a motion to dismiss the indictment on grounds that they were being subjected to multiple punishments for the same crimes in violation of the Double Jeopardy Clause. The defendants argued that they had already been "punished"for the same drug trafficking in the civil forfeiture proceeding. The district court rejected the argument and denied the motion.[3] The defendants then filed this interlocutory appeal pursuant to *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

II

[2,3] The Double Jeopardy Clause prohibits more than one "punishment"for the same offense.[4] *North Carolina v. Pearce*,

[2] The final order of forfeiture did not specify whether the cash, securities, and other personal property constituted proceeds of illegal activities or personal property used in drug trafficking. The complaint sought forfeiture under 21 U.S.C. § 881(a)(6) of proceeds and property traceable to proceeds of illegal drug sales, and under § 881(a)(7) of real property used to facilitate drug trafficking. By arguing on appeal that the personal property forfeited was the proceeds of illegal drug trafficking or directly traceable thereto, the defendants have waived any argument that the forfeited property was anything but proceeds. *See In the Matter of Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1073-74 (5th Cir. 1985).

[3] The district court ruled without the benefit of the Supreme Court's subsequent decision in *Austin v. United States*, ___U.S. ___, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993).

[4] U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ").

395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The pending criminal trial in this case, if it results in a conviction, would, of course, subject the defendants to punishment. Thus, if the prior civil forfeiture proceedings, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a "punishment", the Double Jeopardy Clause will bar the pending criminal trial.[5]

The Supreme Court has classified a civil sanction for wrongful conduct as a "punishment"under the Double Jeopardy Clause when the sanction served a traditional goal of punishment, that is, deterrence or retribution, instead of the remedial goal of reimbursing the government and society for the costs that results from that wrongful conduct. *United States v. Halper*, 490 U.S. 435, 448-49, 109 S.Ct.1892, 1902, 104 L.Ed.2d 487 (1989). In *Halper*, the Supreme Court established the analytical methodology that will guide our determination of whether the civil forfeiture of the proceeds from illegal drug sales in this case served a punitive purpose, or a wholly remedial purpose. As explained below, this methodology focuses on the relationship between the amount of the civil sanction and the amount required to serve the remedial purpose of reimbursing the costs incurred by the government and society as a result of the wrongful conduct. We should make clear, however, that the sanction in *Halper* did not involve the proceeds from the crimes charged and the fact that the property forfeited in today's case constitutes unlawful proceeds is crucial to our analysis.

In *Halper*, 490 U.S. at 437-39, 109 S.Ct. at 1896-97, the government secured the conviction of a defendant on sixty-five counts of violating the False Claims Act by submitting fraudu-

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[5] Regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and second sanctions are deemed punishment. *United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, ___U.S.___, 113 S.Ct. 123, 121 L.Ed.2d 78 (1992).

lent medicare claims. His crimes, however, had only netted him $585 in excess payments from the government, and the district court estimated the government's costs at $16,000. Nevertheless, the government, in a separate civil action, sought to impose an additional penalty of $130,000. Halper argued that the civil penalty constituted a second punishment on him for the same wrongful acts for which he had been criminally convicted and thus violated the Double Jeopardy Clause. *Id.* at 440, 109 S.Ct. at 1897. The Supreme Court reasoned that a government-imposed sanction, whether labelled as "criminal"or "civil", constituted punishment under the Double Jeopardy Clause if-and only if-the sanction, "*as applied in the individual case* serve[d] the goals of punishment," that is, retribution and deterrence, instead of only the traditional remedial purpose of reimbursing the government for the costs incurred because of the defendant's wrongful conduct. *Id.* at 448, 109 S.Ct. at 1899-1902 (emphases added). The Court declined to determine whether a sanction is punitive by focusing on whether a defendant subjectively feels the "sting of punishment." *Id.* at 447, 109 S.Ct. 1901 n. 7. Instead, the *Halper* Court examined the civil sanction in that case with a focus on whether it was so excessive that it was punitive. *See id.*, 490 U.S. at 447, 109 S.Ct. at 1902. The Court stated that a civil sanction constitutes criminal punishment only in the "rare case" in which the amount of the sanction is "overwhelmingly disproportionate"to the damages caused by the wrongful conduct and thus "bears no *rational relation* to the goal of compensating the government for its loss, but rather appears to qualify as 'punishment' within the plain meaning of the word." *Id.* at 449, 109 S.Ct. at 1902 (emphasis added). The Court then remanded to the district court for a determination of the government's actual costs and an application of its rational relation test. *Id.* at 452, 109 S.Ct. at 1904.

In *United States v. Ward*,488 U.S. 242, 254, 100 S.Ct. 2636, 2644, 65 L.Ed.2d 742 (1980), the Supreme Court made clear than the compensation of both the government *and society*

are remedial goals that a civil sanction may serve. The Court stated that a sanction that bore "absolutely no correlation to any damages sustained by society or the cost of enforcing the law" would be criminal. *Id.*

Thus, under *Halper,* we must classify the civil forfeiture of the unlawful proceeds of illegal drug sales under §881(a)(6) as a punishment under the Double Jeopardy Clause if, in this particular case, the amount of the proceeds forfeited was so great that it bore no rational relation to the costs incurred by the government and society resulting from the defendant's criminal conduct.

III

[4] Unlike the fine imposed in *Halper,* the forfeiture of proceeds in this particular case is not so excessive as to render the relationship between the amount of the forfeiture and the resulting costs to the government and society irrational. The forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combatting the allure of illegal drugs, caring for the victims of the criminal trade when preventative efforts prove unsuccessful, lost productivity, etc. *See One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237, 93 S.Ct. 489, 493, 34 L.Ed.2d 438 (1972) (stating that forfeiture of property under the customs laws serves remedial purpose by "provid[ing] a reasonable form of liquidated damages for violation of the inspection provisions [by] . . . reimburs[ing] the Government for investigation and enforcement expenses"); *Halper,* 490 U.S. at 444, 109 S.Ct. at 1900 (stating that costs of detection and investigation are remedial in nature); *Rex Trailer Co. v. United States,* 350 U.S 148, 153-54, 76 S.Ct. 219, 222 & n. 6, 100 L.Ed. 149 (1956)(recognizing market and societal costs resulting from wrongdoing and avoidance of unjust enrichment as remedial purposes); *Ward,* 448 U.S. at 254,

100 S.Ct. at 2644 (recognizing repayment of damages to society as remedial).

Although revenue from illegal drug sales and the cost to the government and society are incapable of exact measurement, a principle recognized in *Halper*, 490 U.S. at 449, 109 S.Ct. at 1902, the amount of illicit drug proceeds confiscated in this case do not appear to be excessive in comparison to the resulting governmental and societal costs. Various sources estimate that illegal drug sales produce approximately $80 to $100 billion per year while exacting $60 to $120 billion per year in costs to the government and society. *See, e.g.*, Martin Wolf, *Thinking About Drug Legislation,* The Financial Times (London), Sept. 4, 1989, at I-19 (estimating drug revenues in the United States to approximate $80 billion year); 134 Cong. Rec. S15,630 (statement of Sen. Danforth) (estimating drug revenues at $100 billion per year and the costs to the government and society of drugs to total at least $110 billion); *Drug Abuse Costs to U.S. May be 125 Billion Dollars-Study,* Reuter Library Report, LEXIS, MAJPAP Library, Sept. 5, 1991 (estimating economic costs of drug abuse to range from $60.4 billion to $124.9 billion); *see also Rex Trailer,* 350 U.S. at 154, 76 S.Ct. at 222 (recognizing that intangible and immeasurable costs to the government are appropriate considerations in determining whether a sanction is remedial or punitive).[6] Clearly, the above overlapping estimates of proceeds and resulting costs are not "overwhelmingly disproportionate" on a national level and, we believe, indicate a rough proportionality between the $650,000 sanction and the resulting governmental and societal costs in this case. Thus, if the drug dealers forfeited all the proceeds of their drug sales, the relation-

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[6] The overlap of the ranges of estimated proceeds of illegal drug sales and resulting governmental and societal costs indicates a rough proportionality in this case in contrast to the overwhelmingly disproportionate relationship between the $130,000 fine and the $16,585 approximation of governmental costs in *Halper,* 490 U.S. at 437-39, 109 S.Ct. at 1896-97.

ship between the amount of the proceeds and the resulting governmental and societal costs would not exhibit the excessive quality found in *Hapler* and would not be irrational for that reason.

Further, in this case, the defendants only forfeited a portion of the total proceeds that their large-scale drug operation produced over several years, i.e., the proceeds on hand at the time of seizure. The amount of the forfeiture bears a direct relation to the specific drug sales that generated those proceeds, but fails to compensate fully for the wrongs done form all the drug sales. Thus, instead of roughly approximating the resulting governmental and societal costs, the instant forfeiture failed to compensate fully for the wrongs done.

The Supreme court's recent opinion in *Austin v. United States,* ___U.S.___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), does not affect our holding today. *Austin,*-U.S. at - , 113 S.Ct. at 2803, dealt with whether forfeitures under §§ 881(a)(4)-conveyances, or means of transporting drugs such as automobiles-and (a)(7)-real estate used in drug transactions-constituted punishment under the Excessive Fines Clause. In distinguishing the civil forfeiture in *One Lot Emerald Cut Stones,*409 U.S. at 237, 93 S.Ct. at 493-a double jeopardy case in which a forfeiture was held not to constitute punishment-the *Austin Court,* ___U.S. at ___ , 113 S.Ct. at 2811-12, stated that the forfeitures of conveyances and real estate have no correlation to, or proportionality with, the costs incurred by the government and society because of the large and unpredictable variances in the values of real estate and conveyances in comparison to the harm inflicted upon government and society by the criminal act. Unlike the real estate forfeiture statute that can result in the confiscation of the most modest mobile home or the stateliest mansion, the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold. The more drugs sold, the more proceeds that will be forfeited. As we have held, these

proceeds are roughly proportional to the harm inflicted upon government and society by the drug sale. Thus the logic of *Austin* is inapplicable to 881(a)(6) - the forfeiture of drug proceeds.

IV

Even absent the rational relation test of the *Halper*, we would nevertheless be required to hold that the forfeiture of the proceeds from illegal drug sales does not constitute punishment because of the implicit and underlying premise of the rational relation test: The nature of the forfeiture proceeding may constitute punishment because it involves the extraction of lawfully derived property from the forfeiting party. Indeed, under the common law, "property was a right derived from society which one lost[through forfeiture] by violating society's laws." 1 William Blackstone, Commentaries on the Laws of England *299, 4 *id* at *382.

[5] When, however, the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. Unlike the $130,000 fine in *Halper*, 490 U.S. at 438, 109 S.Ct. 896, the forfeiture of approximately $650,000 of illegal proceeds does not punish the defendant because it exacts no price in liberty or lawfully derived property from him. The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. *See generally, Lucas v. South Carolina Coastal Council,*-U.S.-,-, 112 S.Ct. 2886, 2894, 120 L.Ed.2d 798 (1992); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). In short, the wrongdoer has nothing, at least nothing to which the law entitles him, to lose form the possible confiscation of the

proceeds form his criminal trade. Thus, we believe the forfeiture of proceeds from illegal drug sales is more closely akin to the seizure of the proceeds from the robbery of a federal bank than the seizure of lawfully derived real property. *See Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 626, 109 S.Ct. 2646, 2652-53, 105 L.Ed.2d 528 (1989) (stating that "the government does not violate the Sixth Amendment if it seizes . . . robbery proceeds, and refuses to permit the defendant to use them to pay for his defense . . . " because "[t]he money, though in [the defendant's] possession, is not rightfully his"); *see also Rex Trailer,* 350 U.S. at 153, 76 S.Ct. at 222 n. 6 (stating that civil sanction may serve to avoid unjust enrichment). Consequently, instead of punishing the forfeiting party, the forfeiture of illegal proceeds, much like to the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word." *Halper,* 490 U.S. at 449, 109 S.Ct. at 1902.

V

Accordingly, we AFFIRM the district court's denial of the defendant's motion to dismiss because the Double Jeopardy Clause does not bar the criminal prosecution of the defendants.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-1394

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JERRY WAYNE TILLEY,
SUSAN WELLS TILLEY,
TOMMY ROSS ANDERSON and
SARAH JANE ANDERSON,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 3-24-94; 5 Cir., ____, ____ F.3d ____)
(May 11, 1994)

Before JOHNSON, JOLLY and JONES, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

United States Circuit Judge

C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

TOMMY ROSS ANDERSON (01),
SARAH JANE ANDERSON (02),
JERRY WAYNE TILLEY (03), and
SUSAN WELLS TILLEY (04),

Defendants.

Criminal Action No. 3:92-CR-417-G
FILED APRIL 29, 1993

MEMORANDUM ORDER

Before the court are all the motions of all defendants to dismiss the charges against them in this case for violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution. For the reasons stated below, the motions are denied.

I. BACKGROUND

Defendants are accused of operating a marijuana distribution organization in the Dallas, Texas area that allegedly sold and delivered several thousand kilograms of marijuana throughout the United States from the summer of 1986 until mid-1991. The government contends that defendants earned millions of dollars as a result of these sales. The government also maintains that the defendants' real property, both business and residential, was integrally involved in the distribution operation. Specifically, it is alleged that marijuana was repackaged and weighed before shipment at one of the defendants' properties and that it was usually picked up for delivery from one of their residences.

The defendants allegedly accumulated, as a result of this operation, large amounts of wealth, evidenced by their ownership of numerous race cars and other expensive cars, luxury homes, and certificates of deposit. Although they displayed these outward signs of wealth, only small amounts of taxable income were reported to the Internal Revenue Service during the relevant years.

On July 25, 1991, the government filed a complaint for forfeiture *in rem* pursuant to 21 U.S.C. §881 (a)(6) and (a)(7). The complaint alleged that various items of real and personal property were subject to forfeiture because they were utilized in drug trafficking, were proceeds from the sale of illegal drugs, or were traceable to such proceeds The complaint also alleged that the real property was used to facilitate the storage and distribution of illegal drugs.

On February 5, 1993, the defendants entered into a stipulated judgment for forfeiture of the subject properties, in which they as claimants agreed, among other things, that the government had probable cause to seize and institute forfeiture proceedings against the defendants' properties. On February 8, 1993, Chief Judge Barefoot Sanders of this court entered a final judgment of forfeiture under which the government took possession of the proceeds from numerous certificates of deposits and checking accounts as well as numerous other articles of personal property, including automobiles, jewelry, miscellaneous electronic equipment, and other personal property.

On April 7, 1993, the defendants filed the instant motions, claiming that a criminal prosecution, after the forfeiture proceeding described above, subjects them to double jeopardy. They argue that the forfeiture suit, although civil in form, is punitive in nature because it serves the aims of deterrence and retribution and because it punishes them for the same acts as those underlying this prosecution. The defendants further contend that because 21 U.S.C. §881 (a)(6) was designed to penalize

defendants for criminal behavior, the government elected that remedy before this prosecution was initiated and is now precluded from pursuing it by the Fifth Amendment's guarantee against double jeopardy.

II. ANALYSIS

The defendants base their argument on *United States v. Halper*, 490 U.S. 435 (1989), which held that a defendant who had been convicted of medicare fraud after a criminal trail could not, consistent with the Fifth Amendment's protection against double jeopardy, also be subject to punitive civil fines under the False Claims Act unless those fines were compensatory or remedial. Contending that a punitive civil proceeding followed by a criminal prosecution can be just as violative of double jeopardy as the reverse situation in *Halper*,[1] the defendants submit that they have already been severely punished by the loss of property worth $500,000 in the related forfeiture proceeding. The government responds that *Halper* does not apply to forfeiture proceedings.

The court agrees with the government's position and with the holding of the Ninth Circuit in *United States v. McCaslin*, 959 F.2d 768, 786 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 382 (1992):

> *Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. The forfeiture of such instrumentalities is "independent of, and wholly unaffected by any criminal proceeding *in personam*."

(quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974) (citations omitted)). *Accord, United States v. Mendoza*, 473 F.2d 692, 694 (5th Cir. 1972) (forfeiture of convicted marijuana trafficker's automobiles not "the equivalent of criminal prosecutions for double jeopardy purposes").

It is impossible, in this court's view, to square the language of *Halper* with the defendants' contentions. *Halper* said:

> What we announce now is a rule for the *rare* case... where a fixed-penalty provision subjects a prolific but small-guage offender to a sanction overwhelmingly disproportionate to the damages he has cause.

490 U.S. at 449 (emphasis added). The defendants maintain that the government cannot prosecute them in this case because it elected to file a civil forfeiture proceeding before bringing this criminal prosecution. That argument, however, proves too much. When property is subject to forfeiture for violation of the law, illegal use of the property immediately vests title to the property in the government, irrespective of the existence of legal proceedings.[2] *See, e.g., United States v. $41,305 in Currency* 802 F.2d 1339, 1346 (11th Cir. 1986); *United States v. One Piece of Real Estate, Etc.*, 571 F. Supp. 723, 725 (W.D. Tex. 1983). "[T]he forfeiture constitutes a statutory transfer of the right [to the property] to the United States at the time the offense is committed." *United States v. Stowell*, 133 U.S. 1, 17 (1890). *Accord, Caplin & Drysdale, Chartered v. United States*, ___ U.S.___, 109 S.Ct. 2646, 2653 (1989). *See also* 21 U.S.C. § 881(h) ("[a]ll right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section"). The only significance of a formal judicial decree of forfeiture is to confirm the forfeiture that has already taken place. *Stowell*, 133 U.S. at 16-17; *One Piece of Real Estate, Etc.*, 571 F. Supp. at 725.

If the defendants' position were correct, large scale drug traffickers whose property is subject to forfeiture under 21 U.S.C. § 881 could always escape criminal prosecution for violation of the drug laws by virtue of the forfeiture already effected by § 881 (h), whether or not judicial forfeiture proceedings had been commenced.[3] Given the sizable number of prose-

cutions these days of offenders whose assets are subject to forfeiture, *Halper* would — under defendants' reading — be declaring a rule not for the *rare* case but for virtually every such case. It is ironic that defendants, whose forfeited properties amounted to $500,000, maintain that they can fit within a rule intended for a "small-gauge offender" *Halper*, 490 U.S. at 449, on the theory that they have been punished enough. By their logic, the larger the offender and size of the resulting forfeiture, the more compelling the claim of double jeopardy.

III. CONCLUSION

For the reasons stated, the court concludes that the double jeopardy clause of the Fifth Amendment is inapplicable to the present case. The defendants' motions to dismiss are accordingly **DENIED**.

SO ORDERED.

April 29, 1993.

/s/
JOE FISH
United States District Judge

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[1] *See United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 123 (1992) ("the order of proceedings matters not to the analysis; the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding").

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA

Plaintiff,

v.

PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS LOCATED AT 230 CEDAR DRIVE, GRAND PRAIRIE, DALLAS COUNTY, TEXAS, ET AL,

Defendants In Rem.

CIVIL ACTION NO. 3-91CV1485-H
FILED FEBRUARY 9, 1993

STIPULATED FORFEITURE OF ALL PROPERTIES, EXCLUDING PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS AT 230 CEDAR DRIVE, GRAND PRAIRIE, DALLAS COUNTY, TEXAS

Attorneys for Plaintiff and Claimants Tommy Ross Anderson and Sarah Jane Anderson stipulate and agree as follows:

A. Claimants Tommy Ross Anderson, Sarah Jane Anderson, and David Almond stipulate and agree that the United States, its agents, officers and employees had probable cause to seize and to institute forfeiture proceedings against the defendant properties named in the Amended Complaint for Forfeiture, with the exception of the Property, All Appurtenances, and Improvements located at 230 Cedar Drive, Grand Prairie, Dallas

---

[2] Defendants stipulated in the related forfeiture proceedings here that, as to the property forfeited, the government had probable cause to seize and to institute forfeiture proceedings.

County, Texas. The property at 230 Cedar Drive, Grand Prairie, Texas, will require further litigation.

B. Claimants Tommy Ross Anderson, Sarah Jane Anderson, and David Almond hereby release claim to:

1. (Property No. 2 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1110 N. Dwight Ave., Dallas, Dallas County, Texas;

2. (Property No. 3 of the Amended Complaint) Property, Ali Appurtenances, and Improvements Located at 1023 N. Dwight Ave., Dallas, Dallas County, Texas;

3. (Property No. 4 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1029 N. Dwight Ave., Dallas, Dallas County, Texas;

4. (Property No. 5 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1033 N. Dwight Ave., Dallas, Dallas County, Texas;

5. (Property No. 10 of the Amended Complaint) Proceeds in Demand Deposit Account #0247395 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

6. (Property No. 12 of the Amended Complaint) The Gold Rolex only of Assorted Jewelry valued at $26,600.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

---

[3] If the defendants are correct that the existence of a previous forfeiture proceeding prevents prosecution of a criminal case under the double jeopardy clause, then two forfeiture cases decided the same term as *Halper, Caplin & Drysdale, Chartered v. United States*, ___ U.S.___, 109 S.Ct. 2646 (1989), and *United States v. Monsanto*, ___ U.S. ___, 109 S.Ct. 2657 (1989), but approximately a month later, either make no sense or were wrongly decided. Those cases upheld the deprivation before trial of assets belonging to persons accused of drug trafficking which, but for the deprivation, they would have used to pay counsel of their choice for defense of the criminal prosecution. By defendants' reasoning, no such prosecution would have been possible since the defendants had already been deprived of their property.

7. (Property No. 13 of the Amended Complaint) Three of Four Vehicles seized at 230 Cedar Drive, Grand Prairie, Texas, consisting of:

One 1966 Chevrolet Nova Super Sport, VIN 118376N121169, Valued at $5,000.00;

One 1982 Chevrolet Corvette, VIN 1G1AY8781C5109106, Valued at $13,000.00; and

Two 1991 Yamaha Waverunners III, with Trailers, ID #YAML48831091, Valued at $10,000.00;

8. (Property No. 14 of Amended Complaint) One Chaparral Trailer, Model 39, Valued at $4,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

9. (Property No. 15 of Amended Complaint) One Mitsubishi Big Screen TV, ID #R58109452, Valued at $3,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

10. (Property No. 19 of Amended Complaint) Two Vehicles in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas, consisting of:

One 1982 Chevrolet 1/2 Ton Pickup, VIN 1GCCC14H5CS182524, Valued at 1,775.00; and

One 1988 Chevrolet One Ton Pickup, VIN 1GCHR33N2JJ116300, Valued at $7,800.00;

11. (Property No. 20 of the Amended Complaint) One Kawasaki Jet-Ski Boat, with trailer, ID #RAW84441E989, Valued at $5,000.00, in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas,

12. (Property No. 21 Of the Amended Complaint) One OKI Cellular Phone, Model SU-002, ID #G36-24265-1, Valued at $1,000.00, in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas;

13. (Property No. 22 of the Amended Complaint) One 1985 Chevrolet Silverado Pickup, VIN 1GCEC14C4FS176800, Valued at $2,975.00, in which Tommy Anderson holds an interest, Seized from Michael D. Sutton at 1029 N. Dwight Avenue, Dallas, Texas,

of the defendant properties and agree to entry of an order forfeiting the properties listed hereinabove to the United States of America.

D. Plaintiff United States of America hereby declines to seek forfeiture of:

1. (Property No. 6 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 110 S. Smith Street, Dallas, Dallas County, Texas;

2. (Property No. 7 of the Amended Complaint) Business Assets, Accounts, and Inventory of Renegade Auto Sales Located at 2122 W. Main St., Grand Prairie, Dallas County, Texas;

3. (Property No. 8 of the Amended Complaint) Proceeds in Money Market Account #7101280 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

4. (Property No. 9 of the Amended Complaint) Proceeds in Certificate of Deposit Account #9990007884 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

5. Property No. 11 of the Amended Complaint) Proceeds in Demand Deposit Account #0262024524 to Tommy Anderson or Jane Anderson Located at Bank One, 202 Main St., Grand Prairie, Texas,

6. (Property No. 12 of the Amended Complaint) Assorted Jewelry valued at $26,600.00, Seized at 230 Cedar Drive, Grand Prairie, Texas, except for a Gold Rolex Watch;

7. (Property No. 13 of the Amended Complaint) One of Four Vehicles seized at 230 Cedar Drive, Grand Prairie, Texas, consisting of:

One 1989 Cadillac Sedan DeVille, VIN 1G6CD5152K4228718, Valued at $12,600;

8. (Property No. 16 of the Amended Complaint) Furniture consisting of Antique Oak Buffet Cabinet and Oak Secretary Desk, Valued at $1,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

9. (Property No. 17 of the Amended Complaint) $1,006.10 in United States Currency, Seized at Renagade Auto, 202 Main Street, Grand Prairie, Texas;

10. (Property No. 18 of the Amended Complaint) Miscellaneous Electronic Equipment, Seized from Renegade Auto, 202 Main Street, Grand Prairie, Texas, consisting of:

IBM PC Model 5160, ID N5581311115160/0567062, Valued at $1,000.00;

Sanyo Video Monitor; Sony Camera, ID #27102825/9000183, Valued at $3,500.00; and

Canon Copier, Model #PC-65, ID #CRP11224, Valued at $1,000.00,

of the total defendant properties and agrees to entry of an order directing the United States Marshal to release the properties listed in this paragraph hereinabove to Claimants Tommy Ross Anderson and Sarah Jane Anderson.

C. As a material inducement to the United States of America to enter into this Stipulated Forfeiture, Claimants Tommy Ross Anderson, Sarah Jane Anderson, and David Almond hereby irrevocably and unconditionally release, acquit, and forever discharge the United States of America, the United States Marshals Service, the United States Drug Enforcement Administration, and any other federal agency or local law enforcement entity, and each of its officers, employees and agents, and all persons acting by, through, under, or in concert with any of them, from any and all claims, demands, causes of action or

any costs, fees, or expenses which the said Claimants Tommy Ross Anderson, Sarah Jane Anderson, and/or David Almond may presently have, or any other claim of loss of injury, costs, fees or expenses, or for contribution or indemnification, whether presently known or unknown, arising from or in any way growing out of or resulting from or which may arise or result from the seizure, storage, possession, custody and control, and release of the above described properties by the United States Marshals Service.

The resolution and disposition by stipulation of this forfeiture *in rem* proceeding in no way is to be construed as an admission of criminal liability by any of the defendants or claimants herein.

D. The parties consent to entry of an order consistent with the terms set forth above and which further provides that each side will bear its own costs and fees.

STIPULATED AND AGREED: RICHARD H. STEPHENS
United States Attorney

/s/
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Assistant United States Attorney
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/s/
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(214)744-3544

ATTORNEY FOR
CLAIMANTS
TOMMY ROSS ANDERSON
SARAH JANE ANDERSON
and DAVID ALMOND

/s/ _____
TOMMY ROSS ANDERSON

/s/ _____
SARAH JANE ANDERSON

/s/ _____
DAVID ALMOND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA
Plaintiff,

v.

PROPERTY, ALL APPURTENANCES,
AND IMPROVEMENTS LOCATED AT
230 CEDAR DRIVE, GRAND PRAIRIE,
DALLAS COUNTY, TEXAS, ET AL,
Defendants
In Rem.

CIVIL ACTION NO. 3-91CV1485-H
FILED FEBRUARY 9, 1993

FINAL JUDGMENT OF FORFEITURE EXCLUDING PROPERTY, ALL APPURTENANCES, AND IMPROVEMENTS AT 230 CEDAR DRIVE, GRAND PRAIRIE, DALLAS COUNTY, TEXAS

Came before this Court the parties in the above styled case on Stipulated Forfeiture. After consideration of the stipulation this Court finds that the Plaintiff had probable cause to seize, arrest, and file forfeiture proceedings against the defendant properties described in the caption of the Amended Complaint for Forfeiture.

The Property, All Appurtenances, and Improvements Located at 230 Cedar Drive, Grand Prairie, Dallas, County, Texas, requires further litigation and is not included in this Final Judgment of Forfeiture.

This Court finds that the only valid claimants to the properties included in this Final Judgment of Forfeiture are Tommy Ross Anderson, Sarah Jane Anderson, and David Almond. All right, title, or interest in the defendant properties by any others is hereby extinguished and barred.

Therefore, it is ORDERED that:

1. Property No. 2 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1110 N. Dwight Ave., Dallas, Dallas County, Texas, further described as:

Being Lot 2 in Block B/8327 of ARCADIA GARDENS ANNEX, an Addition to the City of Dallas, Texas, according to the Map recorded in Volume 31, Page 211 of the Map Records of Dallas County, Texas;

2. (Property No. 3 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1023 N. Dwight Ave., Dallas, Dallas County, Texas, further described as:

Being Lot 2A in Block 19/8335, of the Resubdivision of Lots 1, 2, and 6, in Block 19 of Arcadia Gardens Addition, an Addition to the City of Dallas, Texas according to the Map of said resubdivision, recorded in Volume 31, Page 99, Map Records, Dallas County, Texas,

3. (Property No. 4 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 1029 N. Dwight Ave., Dallas, Dallas County, Texas, further described as:

Being Lot 2B in Block 19/8335, of the Resubdivision of Lots 1, 2, and 6, in Block 19 of Arcadia Gardens Addition, an Addition to the City of Dallas, Texas, according to the Map of said Resubdivision, recorded

in Volume 31, Page 99, Map Records, Dallas County, Texas,

4. (Property No. 5 of the Amended Complaint) Property, All Appurtenances and Improvements Located 1033 N. Dwight Ave., Dallas, Dallas County, Texas, further described as:

Being Lot 1A of the Resubdivision of Lots 1, 2, and 6 in Block 19/8335 of Arcadia Gardens Addition, an addition to the City of Dallas, Texas, according to the Map of said resubdivision recorded in Volume 31, page 99 of the Map Records of Dallas County, Texas; and being the same property conveyed by deed dated 12/27/69 from C.A. Reeves, et ux, Neata D. Reeves to Ruby Faye Haskins, filed 1/5/70 in Volume 70001, page 3211, Deed Records, Dallas County, Texas,

5. (Property No. 10 of the Amended Complaint) Proceeds in Demand Deposit Account #0247395 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

6. (Property No. 12 of the Amended Complaint) The Gold Rolex only of Assorted Jewelry valued at $26,600.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

7. (Property No. 13 of the Amended Complaint) Three of Four Vehicles seized at 230 Cedar Drive, Grand Prairie, Texas, consisting of:

One 1966 Chevrolet Nova Super Sport, VIN 118376N121169, Valued at $5,000.00;

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One 1982 Chevrolet 1/2 Ton Pickup, VIN 1GCCC14H5CS182524, Valued at 1,775.00; and

One 1988 Chevrolet One Ton Pickup, VIN 1GCHR33N2JJ116300, Valued at $7,800.00;

11. (Property No. 20 of the Amended Complaint) One Kawasaki Jet-Ski Boat, with trailer, ID #KAW84441E989, Valued at $5,000.00, in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas,

12. (Property No. 21 of the Amended Complaint) One OKI Cellular Phone, Model SU-002, ID #G36-24265-1, Valued at $1,000.00, in which Tommy Anderson holds an interest, Seized from David Almond at 1029 N. Dwight Avenue, Dallas, Texas;

13. Property No. 22 of the Amended Complaint) One 1985 Chevrolet Silverado Pickup, VIN

1GCEC14C4FS176800, Valued at $2,975.00, in which Tommy Anderson holds an interest, Seized from Michael D. Sutton at 1029 N. Dwight Avenue, Dallas, Texas,

of the defendant properties are hereby forfeited to the United States. The United States Marshal shall dispose of said properties according to law.

It is further ORDERED that the United States Marshal shall release:

1. (Property No. 6 of the Amended Complaint) Property, All Appurtenances, and Improvements Located at 110 S. Smith Street, Dallas, Dallas County, Texas;

2. (Property No. 7 of the Amended Complaint) Business Assets, Accounts, and Inventory of Renegade Auto Sales Located at 2122 W. Main St., Grand Prairie, Dallas County, Texas;

3. (Property No. 8 of the Amended Complaint) Proceeds in Money Market Account #7101280 to Renegade Auto Sales, Located at Bank One, 202 Main St., Grand Prairie, Texas;

4. (Property No. 9 of the Amended Complaint) Proceeds in Certificate of Deposit Account #9990007884 to Renegade Auto Sales, Located at Bank One. 202 Main St., Grand Prairie, Texas;

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6. (Property No. 12 of the Amended Complaint) Assorted Jewelry valued at $26,600.00, Seized at 230

Cedar Drive, Grand Prairie, Texas, except for a Gold Rolex Watch;

7. (Property No. 13 of the Amended Complaint) One of Four Vehicles seized at 230 Cedar Drive, Grand Prairie, Texas, consisting of:

One 1389 Cadillac Sedan DeVille, VIN 1G6CD5152K4228718, Valued at $12,600;

8. (Property No. 16 of the Amended Complaint) Furniture consisting of Antique Oak Buffet Cabinet and Oak Secretary Desk, Valued at $1,000.00, Seized at 230 Cedar Drive, Grand Prairie, Texas;

9. (Property No. 17 of the Amended Complaint) $1,006.10 in United States Currency, Seized at Renegade AUTO, 202 Main Street, Grand Prairie, Texas; and

10. (Property No. 18 of the Amended Complaint) Miscellaneous Electronic Equipment, Seized from Renegade Auto, 202 Main Street, Grand Prairie, Texas, consisting of:

IBM PC Model #5160, ID #N55813115160/0567062. Valued at $1000,00;

Sanyo Video Monitor; Sony Camera, ID #27102825/9000183, Valued at $3,500.00; and

Canon Copier, Model #PC-65, ID #CRP11224, Valued at $1,000.00,

of the defendant properties to Claimants Tommy Ross Anderson and Sarah Jane Anderson through Martin Lenoir, attorney of record for Claimants Tommy Ross Anderson and Sarah Jane Anderson, as soon as is practicable.

Each party shall bear its own costs and attorneys fees. The Clerk shall furnish a copy to each party of record. SIGNED this 9th day of February, 1993.

/s/
BAREFOOT SANDERS,
Chief Judge
United States District Court
Northern District of Texas

(2)

Supreme Court, U.S.
FILED
SEP 27 1994
OFFICE OF THE CLERK

No. 94-231

IN THE

Supreme Court of the United States

OCTOBER TERM 1994

TOMMY ROSS ANDERSON,
SARAH JANE ANDERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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35 P

RESTATEMENT OF OUESTION PRESENTED FOR REVIEW

Whether the forfeiture of property under Title 21 of the United States Code creates a double jeopardy bar to criminal prosecution based on the same conduct giving rise to the forfeiture.

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No. 94-231

In The

Supreme Court Of The United States

OCTOBER TERM 1994

TOMMY ROSS ANDERSON,
SARAH JANE ANDERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

If Tommy and Sarah Anderson lived in California rather than Texas, this federal prosecution would already be concluded. Under *United States v. $405,089.23 in U.S. Currency*, _____ F.3d _____ (9th Cir., No. 93-55947, decision rendered Sept. 6, 1994), (see attached appendix), the double jeopardy clause of the United States Constitution, Amendment V, bars prosecution of a criminal case following the forfeiture of property based on the same activities. By contrast, the Fifth Circuit Court of Appeals in the case at bar has come to the opposite conclusion and allowed this criminal prosecution to continue.

The conflict between the Fifth and Ninth Circuits on this question could not be more clear. In fact, the Ninth Circuit went so far as to recognize the Fifth Circuit's opinion in this case and explicitly disagree with it. Whether the Ninth or the Fifth Circuit is correctly interpreting the precedents of the Supreme Court, and specifically *Austin v U.S.*, 509 U.S. _____, 113 S.

Ct. 2801, 125 L. Ed. 2d 488 (1993), can only be determined by the granting of this Petition for Writ of Certiorari. Based on the stark contrast in the approach of these two Courts of Appeals, this Petition should be granted.

In *United States v. $405,089.23 in U.S. Currency*, the Ninth Circuit was faced with a factual situation that is legally indistinguishable from the case at bar. In *$405,089.23 in U.S. Currency*, the criminal prosecution occurred first, followed by the forfeiture proceeding. Nevertheless, the court's finding that double jeopardy was violated by these multiple proceedings applies with equal force when the order of the proceedings is reversed. This is a fact that even the Fifth Circuit recognized in *U.S. v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, _____ U.S. _____, 113 S. Ct. 123, 121 L. Ed. 2d 78 (1992).

That the specific holding of the Ninth Circuit is directly contrary to the Fifth Circuit's holding in the case at bar is made clear in the following passage from the Ninth Circuit case:

> The government argues that the *Austin* Court's reasoning does not apply to the forfeitures in this case. It asserts that this forfeiture involves only narcotics proceeds, and that such a forfeiture is entirely remedial. The government's position finds support in a recent Fifth Circuit case. *See United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (stating that the forfeiture of illegal proceeds does not constitute punishment). We nonetheless reject that argument. We do so because the government fails to recognize the legal standard that *Austin* established.
>
> Under *Austin*, in order to determine whether a forfeiture constitutes "punishment," we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit.

> The government appears to assume that we must determine in each case whether the particular forfeiture is so excessive in relation to any remedial goal that it must be denominated as "punishment." However, the *Austin* Court explicitly refused to apply such a case-by-case approach to determining whether a forfeiture constitutes "punishment." *See Austin*, 113 S. Ct. at 2812, n. 14. Rather, largely because "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence," *id.*, the Court held that any determination of whether those forfeitures constitute "punishment" must look to the requirements of the forfeiture statute as a whole.
>
> *United States v. $405,089.23 in U.S. Currency*, at page 7-8.

The statutes at issue in the Ninth Circuit case overlapped with those at issue in the Fifth Circuit case. The Ninth Circuit found these statutes, under the reasoning of *Austin*, to constitute punishment. Under the reasoning of the Ninth Circuit, these forfeiture statutes are punitive in nature in all cases, regardless of the characterization of the particular property forfeited. By contrast, the Fifth Circuit characterized the property forfeited in the case at bar as proceeds and found that the forfeiture of proceeds was not punishment. This is directly contrary to the Ninth Circuit's approach of looking to the statute itself instead of the nature of the property. In fact, as succinctly and clearly explained in the Ninth Circuit case, the analysis of this issue by the Fifth Circuit in the case at bar is contrary to *Austin* and several other controlling precedents from the Supreme Court.[1]

---

[1] In footnote 10 of *U.S. v. $405,089.23 in U.S. Currency*, the Ninth Circuit stated:

> The Court's decision in Austin to focus on the forfeiture statute, rather than on the particular conduct alleged by the government, in determining whether the Double Jeopardy Clause applies is also consistent with

On close examination, it is apparent that the Ninth Circuit accepted the very argument that the Fifth Circuit rejected in this case. Following the clear dictates of *Austin*, the Ninth Circuit explained that in determining whether forfeitures under a particular statute constitute punishment, three factors are important. First, based on the historical understanding of forfeiture as punishment, there is a strong presumption that any forfeiture statute does not serve solely a remedial purpose. Secondly, where such a statute focuses on the culpability of the property owner by exempting innocent owners, it is likely that the enactment serves, at least in part, to deter and punish guilty conduct. Thirdly, where Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of the law.

Applying these principles, the Ninth Circuit found 21 U.S.C. § 881(a)(6), the very statute discussed in the Fifth Circuit opinion, to be a punitive forfeiture statute. By focusing on the statute itself, rather than the nature of the property being forfeited, the Ninth Circuit concluded that forfeitures under this statute will always constitute punishment for double jeopardy purposes.

In fact, the Ninth Circuit's conclusion is required under the reasoning of *Austin*. *Austin* made clear that forfeiture under the narcotics statutes constitutes punishment and the Ninth Circuit is simply following Supreme Court precedents in reaching its conclusion.

The Ninth Circuit opinion read *Austin* as resolving the question of whether forfeitures under Title 21 constitute punish-

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its decision the same term in *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993). *Dixon* held that, to determine whether two prosecutions are for the same "offense" under the Double Jeopardy Clause, a court must look to the elements of the statutory offenses charged, rather than the conduct which is alleged to underlie these offenses in the particular case.

ment by concluding that these forfeitures are punitive. The court additionally stated that the test for what is punishment will be the same for double jeopardy purposes as it is for the Eighth Amendment excessive fines clause. Again this is a conclusion that the Fifth Circuit did not reach but the Ninth Circuit's opinion is clearly dictated by *Austin*.

Additionally, in finding double jeopardy protections violated in the case before it, the Ninth Circuit rejected another governmental argument that has gained acceptance in some other circuits. In *U.S. v. One Single Family Residence*, 13 F.3d 1493, 1499 (llth Cir. 1994) and *U.S. v. Millan*, 2 F.3d 17 (2d Cir. 1993), the courts held that criminal prosecutions do not constitute separate proceedings from parallel civil forfeiture actions for double jeopardy purposes. These two courts reasoned that the forfeiture actions took place at approximately the same time and involved the same criminal violations and were part of a "single coordinated prosecution." Although not addressed by the Fifth Circuit in the case at bar, this theory will no doubt be argued by the government as this case proceeds.

The Ninth Circuit in its opinion in *United States v. $405.089.23 in U.S. Currency*, flatly rejected this theory and found that the Eleventh and Second Circuit cases contradicted controlling Supreme Court precedent as well as common sense. In rejecting this theory, the Ninth Circuit stated:

> We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different fact-finders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding." In ordinary legal parlance, such actions are often characterized as "parallel proceedings," but not as the "same proceeding." A forfeiture case and a criminal prosecution would constitute the same proceeding

only if they were brought in the same indictment and tried at the same time.

United States v. $405,089.23 in U.S. Currency, page 4.

Additionally, the Ninth Circuit cited *Jeffers v. United States*, 432 U.S. 137, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977) for the proposition that parallel actions, instituted at about the same time and involving the same criminal conduct constitute separate proceedings for double jeopardy purposes.

In fact, in the case at bar, the forfeiture and the criminal action were instituted at different times, tried at different times before different fact-finders, presided over by different district judges and resolved by separate judgments. Under the Ninth Circuit holding, the forfeiture and criminal proceeding in the case at bar do not constitute the same proceeding.

The questions raised in this Petition are beginning to crop up in courts throughout the country. In addition to the cases cited in the original Petition and this Supplemental Petition, the Seventh Circuit Court of Appeals in *U.S. v. Torres*, 28 F.3d 1463 (7th Cir. 1994) recognized the significant questions raised by *Austin, U.S. v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) and *Montana Department of Revenue v. Kurth Ranch*, _____ *U.S.* _____, *114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994)*. While the court in *Torres* found no double jeopardy violation based upon reasons not present in either the case at bar or the Ninth Circuit case, nevertheless the court recognized that in light of the recent Supreme Court pronouncements in this area there is a high likelihood that a forfeiture proceeding and a criminal prosecution separately pursued would constitute double jeopardy. Moreover, the Seventh Circuit responded to the government's argument that the forfeiture and criminal actions are in reality a single proceeding by stating:

> But if as *Kurth Ranch* holds a civil proceeding to collect a monetary penalty for crime counts as an independent "jeopardy," it does not require much imagination to see the problem. Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema.
>
> *Torres*, 28 F.3d at 1465.

In *Torres*, the Appellant did not make a claim in the forfeiture proceeding and the Seventh Circuit found that there was no evidence that he actually owned the property. Under these circumstances, the court declined to find that the forfeiture placed him in jeopardy. By contrast, in the case at bar, the Petitioners made a claim to the property and it is undisputed that they owned the property. It is a fair reading of the Seventh Circuit case in *Torres* that if the facts had been more akin to those in the case at bar the court would have found a double jeopardy violation.

CONCLUSION

Based on the direct conflict between the Fifth and the Ninth Circuits, as well as the various other conflicting opinions from federal and state courts throughout the country, this Petition for Writ of Certiorari should be granted, *see* Supreme Court Rules, 10.1(a). The meaning of double jeopardy under the Federal Constitution should not vary from state to state and district to district. Persons who live in one part of the country should not be imprisoned when those living elsewhere are set free simply because of the varying interpretations of the law in this area. Rarely does a case with such a profound impact on the criminal justice system reach the Supreme Court with such a clear split of authority. This is an issue that is ripe for decision by this court and therefore this Petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Supplemental Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was forwarded to Mr. Stewart Robinson and Mr. Michael Snipes, Assistant United States Attorneys, 1100 Commerce Street, 3rd Floor, Dallas, Texas 75242, and to the United States Solicitor General, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530, (202) 514-2217, on this the day of September, 1994.

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Cite As: 1994 WL 476736
(9TH CIR. (CAL.)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

$405,089.23 U.S. CURRENCY, et al.,

Defendants.

Charles Arlt; James Wren; Payback Mines,

Claimants-Appellants.

No. 93-55947

United States Court of Appeals, Ninth Circuit

Submitted July 12, 1994.*

Filed September 6, 1994.

Appeal from the United States District Court for the Central District of California A. Wallace Tashima, District Judge, Presiding Charles Wesley Arlt, Lompoc, California, and James Eli Wren, Lompoc, California, pro se, for the claimants-appellants.

Mark A. Feldman, Assistance United States Attorney, Los Angeles, California, for the plaintiff-appellee.

Before: Cecil F. Poole and Stephen Reinhardt, Circuit Judges, and Jack E. Tanner,** District Judge.

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* The panel unanimously finds this case suitable for disposition without oral argument. Circuit Rule 34-4.

** Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

REINHARDT, Circuit Judge:

1.

This case involves the constitutional limits on the government's ability to seek criminal penalties and civil forfeiture based on the same violations of law. The government brought a criminal prosecution against the claimants at approximately the same time as it instituted this separate and parallel civil forfeiture action under 18 U.S.C.§ 981 (a)(1)(A) and 21 U.S.C. § 881 (a)(6). The question is whether the government violated the Double Jeopardy Clause of the Fifth Amendment by obtaining convictions in the criminal case and then continuing to pursue the forfeiture action. We answer the question in the affirmative and reverse the order of forfeiture.

I.

Claimants James Wren, Charles Arlt, and Payback Mines appeal *pro se* the forfeiture of their property following Wren and Arlt's criminal convictions of various counts of conspiracy and money laundering. In the criminal case, Arlt, Wren, and several others had been accused of conducting a large-scale methamphetamine manufacturing operation. Through a series of front corporations, including Payback Mines, the defendants had sought to create the appearance that they were engaging in legitimate gold mining activities.

The government instituted this civil forfeiture action on June 17, 1991, five days after the grand jury issued a superseding indictment in the parallel criminal case. The forfeiture complaint listed several hundred thousand dollars' worth of property: $450,089.23 in a Security Pacific Bank account, $8,929.93 in three Bank of America accounts; $123,000 in cash and 138 silver bars seized at Mayhill Bail Bonds; one Bell 47-G-2 helicopter; one shrimp boat; a Piper 6 Cherokee airplane; and eleven automobiles and one boat purchased at an auction. The

government argued that these pieces of property were connected to the offenses that were the subject of the parallel criminal case. It claimed that the property was forfeitable on two independent grounds: as proceeds of illegal narcotics transactions under 21 U.S.C. § 881 (a) (6), and as property "involved in" money laundering violations under 18 U.S.C. § 981 (a)(1)(A). Arlt, Wren, and Payback Mines filed claims to the res. Pursuant to the stipulation between the parties, the district court effectively stayed the civil forfeiture action pending the completion of the parallel criminal case.

The criminal case terminated on March 27, 1992, with the convictions of Arlt, Wren, and their codefendants. Over eight months later, on December 4, the government filed a motion for summary judgment in the parallel forfeiture action. The government's motion relied on the criminal conviction, a declaration submitted by I.R.S. Special Agent Phillip Mullins, and various pieces of documentary evidence. Asserting that this evidence established probable cause and therefore shifted the burden of proof to the claimants, see 19 U.S.C. § 1615, the government claimed that the claimants had failed to demonstrate that the property was not subject to forfeiture.

On April 1, 1993, the district court granted the government's motion and entered a judgment ordering that the entire res be forfeited to the United States. Adopting the government's proposed statement of uncontroverted facts and conclusions of law with only a few minor alterations, the district court held that "[t]he convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments, and money laundering are sufficient for probable cause by themselves." The court also noted several additional factors, relating to specific pieces of property, which bolstered its conclusion that the government had established probable cause. For example, the court noted that $123,000 is an extremely large amount of cash, that Arlt, Wren,

and Hill had signature authority over several of the bank accounts, and that the vehicles were purchased with cash and placed in the name of Arlt's business, Payback Mines. The district court concluded that the government had established probable cause under both it's "narcotics proceeds" theory and its "money laundering" theory. Because the claimants did not introduce any evidence tending to show that the property was not subject to forteiture, the court granted summary judgment in favor of the government. Arlt, Wren, and Payback Mines appeal *pro se*.

II.

On appeal, Arlt, Wren, and Payback Mines claim that the government lacked probable cause to institute these proceedings, that the Double Jeopardy Clause of the Fifth Amendment bars this action, that the forfeiture violates the Excessive Fines Clause of the Eighth Amendment, and that the district court lacked in rem jurisdiction over a small part of the res. Where reversal of the district court's judgment on one ground would bar further proceedings against a party opposing the government, while reversal on other grounds would afford less than complete relief to that party, we first decide the issue which would afford complete relief. Here, the Double Jeopardy Clause argument, if successful, would result in a complete bar to the maintenance of reinstitution of these proceedings, while the relief sought on the other grounds would not. Thus, we begin with the Double Jeopardy Clause.[1] In this case, because we hold

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[1] The claimants did not raise the double jeopardy argument in the district court. However, they rely on the Supreme Court's decision in *Austin v. Unites States*, 113 S. Ct. 2801 (1993), which was decided after the district court's judgment in this case. The government has responded to the claimants' argument on the merits, and it has not asserted that the claimants waived the double jeopardy defense. Accordingly, we consider the issue to be properly before us.

that the clause is applicable and bars further proceedings, we end with it as well.[2]

A.

The most basic element of the Double Jeopardy Clause is the protection it affords against successive prosecutions — that is, against efforts to impose punishment for the same offense in two or more separate proceedings. That protection applies with equal force whether the first prosecution results in a conviction or an acquittal. See *Burks v. United States*, 437 U.S. 1 (1978); *Brown v. Ohio*, 432 U.S. 161 (1977). Whatever other abuses the Clause prohibits, at its most fundamental level it protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense. "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal act." *Abbate v. United States*, 359 U.S. 187, 198-99 (1959) (opinion of Brennan, J.). This principle is "deeply ingrained in at least the Anglo-American system of jurisprudence," *Green v. United States*, 355 U.S. 184, 187 (1957), and, in fact, traces its roots "deep into Greek and Roman times." *Bartkus v. Illinois*, 359 U.S. 121, 151-52 (1959) (Black, J., dissenting).

There can be little doubt that this case implicates the core Double Jeopardy protection. Over a year after the claimants'

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[2] Although the claimants' relief would be incomplete if we were to rest our decision on probable cause, and thus we do not reach that ground, it seems clear that the government lacked such cause for the institution of these proceedings. In seeking to satisfy its probable cause burden, the government relies almost exclusively on Arlt's and Wren's criminal convictions. Because these convictions were not obtained until after the institution of this forfeiture action, it may not do so. See *United States v. $191,910.00* in U.S. Currency, 16 F.3d 1051, 1066- 71 (9th Cir. 1994).

criminal convictions, a different district judge in a different proceeding awarded the government title to nearly all of the claimants' property because of its connection with the very offenses that resulted in criminal punishment. The forfeiture complaint in this case was based on precisely the same conduct addressed in the claimaint's criminal case, and it sought to forfeit title to the claimant's property on the basis of precisely the same violations of the same statutes. In short, this civil forfeiture action and the claimants' criminal prosecution addressed the identical violations of the identical laws; the only difference between the two proceedings was the remedy sought by the government. Yet the government could have sought both remedies without subjecting Arlt and Wren to multiple and successive proceedings. It could have included a criminal forfeiture count in the indictment which led to the claimants' convictions. However, it did not choose to follow that course. Rather, it elected to pursue its forfeiture action in a separate and parallel proceeding, which was decided after the criminal trial. By doing so, the government prevented Arlt and Wren from "being able, once and for all, to conclude [their] confrontation with society" at the time of the jury's verdict. *United States v. Jorn,* 400 U.S. 470, 486 (1971) (opinion of Harlan, J.).

The government's actions in this case clearly raise substantial double jeopardy concerns. However, to determine whether these actions violate the Fifth Amendment, we must consider two questions: whether the civil forfeiture action and the claimants' criminal prosecution constituted separate "proceedings," and whether civil forfeiture under 21 U.S.C. § 881 (a)(6) and 18 U.S.C. § 981 (a)(1)(A) constitutes "punishment". If the answer to both of these questions is yes, then the government's actions constituted a successive attempt to impose punishment, in violation of the Double Jeopardy Clause.

For the reasons we have expressed above, we have little difficulty in determining that this civil forfeiture proceeding

constitutes a separate "proceeding" from the prosecution which resulted in the claimant's criminal convictions. We recognize that the Second and Eleventh Circuits have recently held in cases like this one that criminal prosecutions do not constitute separate "proceedings" from parallel civil forfeiture actions for double jeopardy purposes. See *United States v. One Single Family Residence,* 13 F.3d 1493, 1499 (11th Cir. 1994); *United States v. Millan,* 2 F.3d 17, 20 (2d Cir. 1993). Those courts relied on the fact that the forfeiture actions and criminal prosecutions took place at approximately the same time and involved the same criminal violations, and were part of a "single, coordinated prosecution." One Single Family Residence, 13 F. 3d at 1499. For that reason, the Second and Eleventh Circuits refused to conclude that the parallel criminal and civil actions constituted separate "proceedings." However, we believe that the position adopted by the Second and Eleventh Circuits contradicts controlling Supreme Court precedent as well as common sense.

We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding."[3] In ordinary legal parlance, such actions are often characterized as "parallel proceedings," but not as the "same proceeding." A forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time.[4] The government could have sought criminal forfeiture in this case pursuant to 18 U.S.C.§§ 982, 3554 and 21 U.S.C. § 853. If it

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[3] Cf. Abbate, 359 U.S. at 202 (Black, J., dissenting) ("The legal logic used to prove one thing to be two is too subtle for me to grasp.").

[4] We do not mean to suggest that the Double Jeopardy Clause prevents a forfeiture count from being tried separately from other criminal counts based on the same offense if the defendant consents to separate trials. Nor do we express any view as to bifurcated proceedings before the same fact-finder and presiding judicial officer.

had done so and included the forfeiture count in the same indictment as the other criminal counts and then proceeded to trial against the defendants on all counts, the forfeiture case and the criminal prosecution would have constituted the same "proceeding."[5] However, the government chose to proceed against the claimants on two separate fronts — in two separate, parallel proceedings. Because the district court followed the customary practice and held the civil action in abeyance pending the outcome of the criminal prosecution, the government obtained a significant advantage: if it succeeded in the criminal case it could obtain summary judgment based on the conviction (assuming of course that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standards applicable in civil proceedings applied. See 1 David B. Smith, Prosecution and Defense of forfeiture Cases, P 10.01, at 10-4 to 10-5 (1993) (noting that it is to the government's advantage to have the civil forfeiture action heard after the criminal case). We believe that such a coordinated, manipulative prosecution strategy heightens, rather than diminishes, the concerns that the government is forcing an individual to "run the gantlet" more than once. Green 355 U.S. at 190. We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of "single, coordinated prosecution."[6]

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[5] Such an attempt to impose multiple punishments in the same proceeding would satisfy the Double Jeopardy Clause so long as the legislature intended to impose both criminal forfeiture and the more standard criminal penalties for a violation of the criminal statutes at issue here. *See Missouri v. Hunter*, 459 U.S. 359 (1983). The issue in such a case would simply be one of statutory construction.

[6] Were we to consider successive attempts to exact punishment to constitute the "same proceeding" under the Double Jeopardy Clause simply because they were brought as part of a "single, coordinated prosecution," we would be encouraging one of the worst abuses of prosecutorial power-the government's coordinated use of multiple proceedings to harass or exhaust particular defendants. In one prominent recent example, the federal govern-

In fact, the Supreme Court has made clear that parallel actions, instituted at about the same time and involving the same criminal conduct, constitute separate proceedings for double jeopardy purposes. See *Jeffers v. United States*, 432 U.S. 137 (1977). In Jeffers, the government initiated parallel criminal actions against the same defendant based on the same conduct by bringing two separate indictments on the same day. One indictment charged a conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. §§ 841 (a) (1) and 846. The other indictment charged Jeffers with conducting a continuing criminal enterprise to violate the drug laws, in violation of 21 U.S.C. § 848. Jeffers opposed the government's motion to join the offenses for trial, and the district court denied the motion. After the first jury convicted Jeffers of the conspiracy count, he moved to dismiss the continuing criminal enterprise case on double jeopardy grounds. The district court held that 21 U.S.C. §§ 846 and 848 constituted separate offenses for double jeopardy purposes, and accordingly denied the motion. The Seventh Circuit affirmed on the same ground.

In affirming the judgment of Seventh Circuit, the Supreme Court explicitly rejected that court's reasoning. It held that 21 U.S.C. § 846 was a lesser included offense of 21 U.S.C. § 848. Accordingly, the two statutes stated the "same offense" under the Blockburger test, and the second and separate prosecution would ordinarily have been barred by the Double Jeopardy Clause. See Jeffers, 432 U.S. at 147-51 (plurality opinion); *id.* at 158 (Stevens, J., dissenting in part and concurring in the

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ment unsuccessfully sought to engage in a coordinated campaign of multiple prosecutions in an attempt to shut down one of the largest retail distributors of sexually oriented literature in the United States. See *United States v. P.H.E., Inc.*, 965 F.2d 848, 850-53 (10th Cir. 1992) (describing this campaign); *PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15, 17-20 (D.D.C. 1990) (same). In the cited cases the Tenth Circuit ordered a hearing regarding whether an indictment arising from this scheme should be dismissed on the grounds of prosecutorial vindictiveness, see 965 F. 2d at 860,

judgment in part). However, the plurality of four justices held that, by opposing the government's motion for joinder, Jeffers had waived any objection to the maintenance of separate proceedings. See *id.* at 152 (plurality opinion) ("[A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." In dissent, Justice Steven (joined by three other justices) argued that Jeffers had not waived any double jeopardy objection, and that a separate trial on the second indictment was accordingly barred. See *id.*at 158-60 (Stevens, J., dissenting in part and concurring in the judgment in part). In short, the decisions of eight of the nine justices in Jeffers rested on the common sense proposition that two parallel criminal cases, which unquestionably were brought as a part of a "single, coordinated prosecution," constituted "separate proceedings," for double jeopardy purposes. [7] See also Missouri v. Hunter, 459 U.S. 359, 360, 366, 367, 368, 369 (1983) (stating that there is no double jeopardy bar to the imposition of multiple punishments at a " single trial" (emphases added); see also *id.* at 365 (" Because respondent has been subjected to only one trial, it is not contended that his right to be free from multiple trials for the same offense has been violated.") (emphasis added). We can discern no reason why two proceedings should be deemed one when one of the proceedings involves a criminal prosecution and the other a civil forfeiture action. We conclude, therefore, that whether or not actions are brought as part of a "single, coordinated prosecution" is irrelevant for purposes of the Double Jeopardy Clause: a civil forfeiture action which is brought

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and the District Court for the District of Columbia issued a preliminary injunction against further prosecution of the scheme. See 743 F. Supp. at 27.

[7] The ninth justice, Justice White, did not discuss this issue, because he concluded that 21 U.S.C. § 846 was not a lesser included offense of 21 U.S.C. § 848.

and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate "proceeding." Thus, we must turn to the question whether the forfeiture the government seeks to impose constitutes "punishment."

B.

A decade ago, the law was clear that civil forfeitures did not constitute "punishment" for double jeopardy purposes. In *United States v. One Assortment of 89 Firearms,* 465 U.S. 354 (1984), the Supreme Court held that the claimant's prior acquittal on criminal charges did not bar a subsequent action for forfeiture under 18 U.S.C. § 924 (d). Applying the test set forth in United States v. Ward, 448 U.S. 242, 248 (1980), the Court concluded that Congress intended for forfeiture to be "a remedial civil sanction." 89 Firearms, 465 U.S. at 363. Accordingly, it held that the Double Jeopardy Clause did not apply.

The Ward test, on which the Supreme Court rested its double jeopardy holding in 89 Firearms, focused heavily on the label Congress had attached to a particular sanction. If Congress indicated a preference that the proceeding be denominated "civil" rather than "criminal," the Court would defer to that preference except in extraordinary circumstances. See Ward, 448 U.S. at 248. However, as sometimes happens, the Court changed its collective mind. It abandoned the Ward approach in *United States v. Halper,* 490 U.S. 435 (1989). There, the Court held that "the labels "criminal" and "civil" are not of paramount importance" in determining whether a sanction constitutes punishment for double jeopardy purposes: "The notion of punishment, as we understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." *Id.* at 447-48. Applying these principles, the Court adopted a new test for determining whether a nominally civil sanction constitutes "punishment" for double jeop-

ardy purposes: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 448 (emphasis added). Just last year it reaffirmed its new-found wisdom, emphasizing again that a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. See *Austin v. United States,* 113 S. Ct. 2801, 2806, 2812 (1993); see also *United States v. Hudson,* 14 F.3d 536, 540 (10th Cir. 1994) ("Appellants contend that the above quoted language means that unless a sanction is "solely" remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in *Austin v. United States.").*

Halper involved a civil action brought under the False Claims Act. In *United States v. McCaslin,* 959 F. 2d 786 (9th Cir.), cert. denied, 113 S. Ct. 382 (1992), we underestimated its force and refused to apply its rationale in a civil forfeiture action brought under 21 U.S.C. § 881(a) (7). We held that "Halper has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government." McCaslin, 959 F. 2d at 788. However, in its subsequent decision in Austin, the Supreme Court said that we were wrong and directly rejected our McCaslin analysis. In Austin, the court specifically applied the Halper test to determine whether a civil forfeiture under 21 U.S.C. §§ 881 (a)(4) & (a) (7) constituted "punishment," and it concluded that those provisions did in fact impose punishment under that test. See Austin, 113 S. Ct. at 2812 ("In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881 (a) (4) and (a) (7) on the culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881 (a) (4)

and (a) (7) serves solely a remedial purpose.") (citing Halper, 490 U.S. at 448).

As the government notes, the specific holding in Austin was that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture actions. However, in determining whether the Excessive Fines Clause applied, the Court found it necessary to determine, as we are required to determine here, whether the forfeiture statutes at issue constituted "punishment". It employed the Halper test — the same test it had used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double Jeopardy Clause in making that determination. We believe that the only fair reading of the Court's decision in Austin is that it resolves the "punishment" issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the Halper criteria, it constitutes "punishment" for purposes of both clauses.[8] See Smith, *supra,* P 12.10 [2], at 12-131 ("The Supreme Court's decision in *Austin v. United States,* makes it clear that Halper's double jeopardy protection do apply to the vast majority of civil forfeiture cases.") (footnote omitted). In light of the decision in Austin, and applying the Halper test here, we find the conclusion inescapable that civil forfeiture under 18 U.S.C. § 981 (a) (1) (A) and 21 U.S.C. § 881 (a) (6) constitutes "punishment"which triggers the protections of the Double Jeopardy Clause.

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[8] To make it clear, we hold only that because the method of determining whether the forfeiture constitutes punishment is identical, the answer to the question whether a particular forfeiture constitutes punishment will always be the same for purposes of the Double Jeopardy Clause and the Eighth Amendment. Whether a violation of either clause exists involves factors that are different with respect to each clause. Thus, even though we may conclude that a particular forfeiture may involve "punishment," we could still conclude, depending on the facts in the case before us, that both clauses were violated, neither clause was violated, or a violation of one but not the other occurred.

The government argues that the Austin Court's reasoning does not apply to the forfeitures in this case. It asserts that this forfeiture involves only narcotics proceeds, and that such a forfeiture is entirely remedial. The government's position finds support in a recent Fifth Circuit case. See United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994) (stating that the forfeiture of illegal proceeds does not constitute punishment). [9] We nonetheless reject that argument. We do so because the government fails to recognize the legal standard that Austin established.

Under Austin, in order to determine whether a forfeiture constitutes "punishment", we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit. The government appears to assume that we must determine in each case whether the particular forfeiture is so excessive in relation to any remedial goal that it must be denominated as "punishment." However, the Austin Court explicitly refused to apply such a case-by-case approach to determining whether a forfeiture constitutes "punishment." See *Austin,* 113 S. Ct. at 2812 n. 14. Rather, largely because "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence, " *id.*, the Court held that any determination of whether those forfeitures constitute "punishment," must look to the requirements of the forfeiture statute as a whole. See Smith, supra, P 12.10 at 12-13 ("the Austin Court thought that in the forfeiture context it made sense to focus on the forfeiture statutes as a whole"). In doing so, the Court adopted a categorical approach to "punishment" determination in the forfeiture context, much like the categorical approach it had

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[9] The government also relies on the Fourth Circuit's pre-Austin decision in United States v. Borromeo, 995 F.2d 23, 27 (4th cir. 1993). For the reasons set forth in the text, we believe that Borromeo does not survive Austin.

adopted for determining whether a particular statue defines a "violent felony" for purposes of the Firearms Owners' Protection Act. See *Taylor v. United States*, 495 U.S. 575, 600-02 (1990); see also *United States v. Sherbondy*, 865 F.2d 996, 1005-1010 (9th Cir. 1988). [10] To determine whether the forfeiture the government seeks to impose in these proceedings constitutes "punishment", we must focus on the characteristics of the forfeiture statutes on which it relies.

While the government appears to rely principally on its argument that the res consists entirely of illegal proceeds, [11] we will also construe its argument, generously, as contending that the forfeiture statutes involved are limited to the forfeiture of illegal proceeds, and that they therefore do not impose "punishment." This argument not only misconceives the legal standard established in Austin but also misstates the scope of the statutes involved. In determining that forfeitures under §§ 881 (a) (4) & (a) (7) constituted "punishment" under the Halper test, the Austin court relied on three facts. First, the Court noted that "the historical understanding of forfeiture as punishment"

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[10] The Court's decision in Austin to focus on the forfeiture statute, rather than on the particular conduct alleged by the government, in determining whether the Double Jeopardy Clause applies is also consistent with its decision the same term in United States v. Dixon, 113 S. Ct. 2849, 2860 (1993). Dixon held that, to determine whether two prosecutions are for the same "offense" under the Double Jeopardy Clause, a court must look to the elements of the statutory offenses charged, rather than the conduct which is alleged to underlie these offenses in the particular case.

[11] If we were to look to the particular facts of this case, it is far from clear that we would accept the government's argument that the entire res consists of narcotics proceeds. The government apparently believes that we can conclude that money and property are derived from narcotics transactions simply because people with an interest in that property have been convicted of engaging in a narcotics conspiracy. Because, with few exceptions, the government has not provided any evidence of a more specific link between narcotics transactions and the property at issue, it would be most difficult, on the record before us, to conclude that the property consists entirely of illegal proceeds.

weighed heavily in favor of the conclusion that forfeiture continues to serve punitive purposes. Austin, 113 S. Ct. at 2812. Second, the Court discerned a punitive purpose from "the clear focus of §§ 881 (a) (4) and (a) (7) on the culpability of the owner." *Id* According to the Austin Court, this focus was evident from the fact that the statutes "expressly provide an, innocent owner defense" and thus authorize forfeiture only where the owner is himself involved in illegal activity. *Id.* at 2810. Finally, the Court in Austin relied on "the evidence that Congress understood those provisions as serving to deter and punish" to support its conclusion that the §§ 881 (a) (4) & (a)(7) did not serve solely remedial purposes. *Id.* at 2812. In substantial part, this evidence consisted of the fact that "Congress has chosen to tie forfeiture directly to the commission of drug offenses." *Id.* at 2811.

Austin thus makes clear that at least three principles are relevant to determining whether a forfeiture constitutes "punishment." First, because of "the historical understanding of forfeiture as punishment," *Id.* at 2812, there is a strong presumption that any forfeiture statute does not serve solely a remedial purpose. Second, where such a statute focuses on the culpability of the property owner by exempting innocent owners or lienholders it is likely that the enactment serves at least in part to deter and punish guilty conduct. Finally, where Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law.

These principles dictate that forfeiture under the statutes at issues in this case constitutes "punishment". The historically-based presumption that forfeiture is punishment continues to apply. Moreover, the statutes on which the government relies in this case focus on "the culpability of the owner," *Id.*, by providing an "innocent owner" defense. See 18 U.S.C. § 981

(a)(2) ("No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder." 21 U.S.C. § 881 (a) (6) , [N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." Finally, in drafting 21 U.S.C. § 881 (a)(6) (directly tying forfeiture to any violation of this subchapter) and 18 U.S.C. § 981 (a)(i)(A) (directly tying forfeiture to violation of specific criminal statutes.) "Congress has chosen to tie forfeiture directly" to the commission of specific offenses. Austin, 113 S. Ct. at 2811. Thus, applying the principles set forth in Austin, we must conclude that the statues relied upon by the government in this case operate at least in part to punish and deter.

Moreover, as we mentioned, the government misrepresents the sweep of the forfeiture statutes it invokes in this case. Despite the government's argument, the statutes are not limited to the proceeds of illegal activity. The so-called narcotics proceeds forfeiture statute, 21 U.S.C. §881 (a) (6), applies to all money "furnished or intended to be furnished by any person in exchange for a controlled substance" as well as to any money which is "used or intended to be used to facilitate any violation of this subchapter." *Id* (emphasis added). This statutory language is not limited to criminal proceeds that is, money that has been furnished in exchange for drugs. Rather than rendering only the profits of drug dealers subject to forfeiture, the statute applies to nearly any money that is involved in a narcotics transaction in some fashion. In addition to narcotics proceeds, the statute renders forfeitable money that someone intends to use to purchase drugs, or even money that someone intends to use to purchase a car or boat in order to facilitate an illegal narcotics transaction.

The money laundering forfeiture statute, 18 U.S.C. §981 (a)(1)(A), is similarly broad. It applies to any property which is "involved in" an illegal money laundering transaction. The government took pains to argue before the district court that property "involved in" a money laundering offense includes more than the actual money that is laundered. See Government's Memorandum of Contentions of Fact and Law (CF 46), at 17-20. Indeed, the government relied on a case which expressly rejected any limitation of §981 (a)(1)(A) to criminal proceeds. See United States v. Certain Funds on Deposit, 769 F. Supp. 80, 84-85 (E.D.N.Y. 1991) ("As the Government contends, limiting the forfeiture of funds under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of legitimate moneys to advance or facilitate the scheme."), quoted in Government's Memorandum of Contentions of Fact and Law at 19.[12]

As the Supreme Court did in Austin, we conclude that the forfeiture statutes at issue here do not serve solely a remedial purpose. Accordingly, "even assuming that [these statutes] serve some remedial purpose, the Government's argument must fail." *Id.* at 2812 (emphasis added). The civil forfeiture the government seeks to impose constitutes "punishment." Because the government is attempting to exact this form of "punishment" in a separate proceeding from the claimant's criminal trials, this action is barred by the Double Jeopardy Clause.

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[12] Because the government argued vigorously in the district court that § 981 (a)(1)(A) is not limited to the proceeds of illegal activity, and it continues to rely on that statute in defending the district court's order of forfeiture, it cannot now claim that this case involves only forfeiture of illegal proceeds. See *Russell v. Rolfs*, 893 F.2d 1033, 1037-39 (9th Cir. 1990), cert. denied. 111 S. Ct. 2915 (1991).

III.

The Supreme Court's decision in Austin will doubtless have a significant effect on the government's manner of proceeding in many cases. Because in the case of statutes like those before us a criminal prosecution and a forfeiture action based on the same offense must now be brought in the same proceeding that is, the same indictment-the government will often be forced to choose whether to include a criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceeding) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally). If, in such cases, the government wishes both to obtain forfeiture and to impose other forms of criminal punishment, it "will have to rely to a much greater extent on criminal forfeiture." *Smith, supra,* P 12.10[2], at 12-131 to 12-132. It is entirely reasonable to put the government to this choice. After Austin, the law requires it.

For the foregoing reasons, the judgment of the district court is REVERSED and the case is REMANDED with instructions to dismiss with prejudice.

REVERSED and REMANDED.

Nos. 94-231 and 94-243

FILED
OCT 28 1994

In the Supreme Court of the United States

OCTOBER TERM, 1994

TOMMY ROSS ANDERSON AND SARAH JANE ANDERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

JERRY WAYNE TILLEY AND SUSAN WELLS TILLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in treating the properties forfeited as proceeds of illegal drug sales, based on facts alleged in the forfeiture complaint, the stipulated judgment of forfeiture, and petitioners' representations on appeal.

2. Whether the Double Jeopardy Clause of the Fifth Amendment prohibits the criminal prosecution of petitioners for drug crimes, following a civil judgment of forfeiture against the proceeds of some of petitioners' narcotics activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-231

TOMMY ROSS ANDERSON AND SARAH JANE ANDERSON, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 94-243

JERRY WAYNE TILLEY AND SUSAN WELLS TILLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 18 F.3d 295.[1] The opinion of the district court denying the motion to dismiss the indictment on double jeopardy grounds (Pet. App. 14a-20a) is unreported.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 94-243.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1994. A petition for rehearing was denied on May 11, 1994. Pet. App. 13a. The petition for a writ of certiorari in No. 94-231 was filed on August 8, 1994, and the petition in No. 94-243 was filed on August 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are under indictment for narcotics-related offenses in the United States District Court for the Northern District of Texas. Petitioners moved to dismiss those charges on the ground that their prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment, because the government previously forfeited cash, securities, and other personal property claimed by petitioners. The district court denied petitioners' motion to dismiss the criminal charges. Pet. App. 14a-20a. The court of appeals affirmed. *Id.* at 1a-12a.

1. Petitioners operated a large-scale marijuana distribution organization in the Dallas, Texas, area. From 1986 until 1991, that operation allegedly sold and delivered several thousand kilograms of marijuana throughout the United States. Petitioners accumulated large amounts of wealth, as evidenced by their ownership of numerous expensive automobiles, luxury homes, jewelry, and certificates of deposit. In spite of the outward signs of wealth they displayed, petitioners reported only small amounts of taxable income to the Internal Revenue Service during the relevant years. Pet. App. 2a-3a, 14a-15a.

On July 25, 1991, the government commenced a civil action for forfeiture, pursuant to 21 U.S.C. 881(a)(6) and (7), against various items of real and personal property

held by petitioners.[2] The forfeiture complaint alleged that the items of personal property were the proceeds from the sale of illegal drugs, or were traceable to such proceeds, and that the real property was used to facilitate the storage and distribution of illegal drugs. See 94-243 Pet. 2; Pet. App. 2a-3a & nn.1-2, 15a, 21a-35a.

On October 8, 1992, while the forfeiture proceeding was pending, an indictment was returned charging petitioners and others with conspiracy to possess marijuana

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[2] 21 U.S.C. 881(a)(6) and (7) provide as follows:

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

with intent to distribute it, and to use a communication facility in the commission of a drug-related felony, in violation of 21 U.S.C. 846, and with 13 counts of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a-3a.[3]

On February 5, 1993, petitioners entered into a stipulated forfeiture agreement with the United States, by which they agreed to forfeit cash, certificates of deposit, automobiles, and other personal property with a value totalling approximately $650,000. Pet. App. 48a-61a; 94-231 Pet. App. D1-D7. Based on the stipulated forfeiture agreement, the district court entered a judgment of forfeiture; the judgment did not include forfeiture of two homes belonging to petitioners. Pet. App. 3a, 15a-16a, 62a-72a.

2. Following the stipulated forfeiture, in April 1993, petitioners filed a motion to dismiss the indictment, claiming that a criminal prosecution after the forfeiture judgment would subject them to double jeopardy. Pet. App. 3a, 16a, 73a-86a. Petitioners relied on *United States* v. *Halper*, 490 U.S. 435 (1989), in which this Court held that a civil fine could be considered "punishment" so as to make the Double Jeopardy Clause applicable, if the civil sanction were so "overwhelmingly disproportionate" to the damage caused that it could "not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 449.

The district court rejected petitioners' claim. Pet. App. 14a-20a. The court reasoned that if petitioners were correct, the rule of *Halper*, specifically limited by this Court to "the rare case" (490 U.S. at 449) where a

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[3] Petitioners Jerry Wayne Tilley and Tommy Ross Anderson were also charged with one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i).

small-gauge offender suffers a sanction grossly disproportionate to the damage he caused, would apply to virtually every case in which the government seeks forfeiture of the property of drug traffickers. Pet. App. 18a-19a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court considered all of the personal property forfeited to represent the "proceeds" of illegal drug trafficking, based on the allegations in the forfeiture complaint as well as petitioners' argument on appeal. *Id.* at 3a n.2, 5a. The court then determined that, unlike the fine imposed in *Halper*, the forfeiture of the proceeds of illegal drug sales in this case is fairly characterized as remedial. Noting the substantial governmental and societal costs that result from trafficking in illegal drugs, the court found that the amount of illicit drug proceeds forfeited in this case was not excessive in relation to the $60 billion to $120 billion per year in estimated costs. Furthermore, because petitioners forfeited only a portion of the total proceeds they had amassed over several years, the court concluded that the amount forfeited actually failed to compensate the government fully for the entire amount of the harm the drug sales had caused. *Id.* at 7a-9a.

The court also rejected petitioners' claim that *Austin* v. *United States*, 113 S. Ct. 2801 (1993), requires that all forfeitures be considered "punishment" for double jeopardy purposes. The court noted that *Austin* held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures obtained pursuant to 21 U.S.C. 881(a)(4) and (7). The court, however, distinguished those forfeitures—which generally involve conveyances used to transport drugs and real estate used in drug transactions—from forfeitures involving the proceeds of criminal activity. The court explained that

the forfeiture of drug proceeds, unlike the forfeiture of facilitating property, will always be "roughly proportional to the harm inflicted upon government and society by the drug sale," because the amount of forfeitable proceeds turns on the amount of drugs sold. Pet. App. 9a-10a.

Finally, the court held that the test of *Halper* should not apply in any event to the forfeiture of illegal drug proceeds, because the government does not punish when it confiscates property that was not lawfully acquired. In such cases, "the forfeiting party loses nothing to which the law ever entitled him." Pet. App. 10a. The court explained:

> The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. * * * [T]he forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word."

Id. at 11a-12a (quoting *Halper*, 490 U.S. at 449).

ARGUMENT

1. Petitioners contend (94-231 Pet. 17-19; 94-243 Pet. 23-27) that the court of appeals erred in concluding that the property forfeited in this case was proceeds of illegal drug sales. Petitioners contend that the district court found that the forfeited properties were "instrumen-

talities" of drug trafficking, and that the court of appeals should have ordered an evidentiary hearing on that question. There is no merit to those claims.

Contrary to petitioners' claims, the district court made no finding that the forfeited properties were instrumentalities, as opposed to proceeds, of the drug crimes. The district court broadly held that the reasoning of *United States* v. *Halper*, 490 U.S. 435 (1990), had no application to forfeiture, relying on a Ninth Circuit case decided before this Court's decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993). Pet. App. 16a-19a. The specific character of the properties or the basis for the forfeiture of each property did not figure at all in the district court's reasoning.

The court of appeals noted that the district court's order did not specify whether the personal property constituted actual proceeds of drug sales or property used in the commission of the crimes. As the court of appeals recognized (Pet. App. 3a n.2), however, the forfeiture complaint, with the accompanying affidavit that was incorporated by reference, alleged that the personal property and some of the real property sought to be forfeited were proceeds of the illegal drug sales. See Complaint for Forfeiture, Anderson R.E. Tab 6, at 9-10; Verification Affidavit, Anderson R.E. Tab 10, at 32-41; Verification Affidavit, Tilley R.E. Tab 8, at 51-56. In the stipulated forfeiture, petitioners agreed that the United States had probable cause to seize and forfeit the properties named in the complaints, with certain properties excepted, and they thereby accepted the allegations of the complaints. See Pet. App. 48a-49a; 94-231 Pet. App. D1.

Furthermore, petitioners expressly urged the court of appeals to decide the case on the theory that the forfeited properties were "proceeds" of drug activity, not

instrumentalities. See Anderson C.A. Br. 21; Tilley C.A. Br. 2, 12-15. Indeed, petitioners' strategy was to attack the district court for failing to recognize that the properties were "proceeds" of their drug activities. As the Tilley petitioners put it, the district court's purported assumption that the properties were "instrumentalities" was not "relevant to this case, because the record is absolutely devoid of evidence indicating that these properties were forfeited as 'instrumentalities,' and is replete with evidence to the contrary, i.e., that these properties were forfeited as 'proceeds' of drug transactions, which are not 'instrumentalities' of a crime, but are instead a person's reward for committing the crime." Tilley C.A. Br. 12. The Anderson petitioners made claims to the same effect. See Anderson C.A. Br. 21.[4] In light of those

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[4] The Anderson petitioners argued (C.A. Br. 21) that

> [t]he fatal flaws [*sic*] in the District Court's order is its assumption that the property forfeited here was "instrumentalities" of the alleged crime. The record is devoid of any evidence supporting, much less compelling, this conclusion. Moreover, if given the opportunity through a proper hearing Appellants will demonstrate that the seized property in fact was not the instrumentalities [*sic*] of any crime. It should be noted that the forfeiture documents * * * do not establish that the forfeited property was instrumentalities of the crime and as the District Court noted * * *, the forfeiture proceedings were based on alternative theories of the property being instrumentalities of the offenses as well as proceeds from the offenses.
>
> [The case relied on by the district court] does not stand for the proposition that the forfeiture of *proceeds* of a drug offense can never constitute double jeopardy in face [*sic*] of a criminal prosecution for the same conduct.

arguments, the court of appeals correctly concluded that petitioners "waived any argument that the forfeited property was anything but proceeds." Pet. App. 3a n.2. That fact-bound ruling warrants no further review.

2. Petitioners also contend (94-231 Pet. 4-17; 94-243 Pet. 4-22) that the forfeiture of property as proceeds of an illegal drug business under 21 U.S.C. 881(a)(6) is punitive in nature and that its imposition bars a subsequent criminal prosecution for the same conduct. The court of appeals correctly rejected that claim, and further review is not warranted.

In *United States* v. *Halper*, 490 U.S. 435 (1989), the Court held that the defendant, who had previously been convicted of crimes growing out of his Medicare fraud, could not be subjected to a punitive civil penalty for those crimes without violating the Double Jeopardy Clause of the Fifth Amendment. The Court stated that it was announcing a rule for "the rare case" in which "a prolific but small-gauge offender [is subjected] to a sanction overwhelmingly disproportionate to the damages he has caused," so that the sanction "may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 449. The Court made clear, however, that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446; *id.* at 452-453 (Kennedy, J., concurring).

See also *id.* at 10 ("The forfeiture action in this case was begun and pursued with a punitive purpose, i.e., to take from Appellants property allegedly acquired by illegal drug dealing").

Halper does not support petitioners' claim that a civil forfeiture of the proceeds of drug activity—*i.e.*, the seizure of the ill-gotten profits from narcotics trafficking—must always be characterized as punitive. To the contrary, as the court of appeals noted, the forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) is akin to the forfeiture of contraband or other illegal items; that action is thus clearly remedial. Nothing in *Halper* suggests that it is "punishment"—"in the plain meaning of the word," 490 U.S. at 449, or in any other sense—for the government to seize the illegally acquired profits of criminal activity. Indeed, as the court of appeals suggested (Pet. App. 11a), petitioners' legal theory, if adopted, would permit a bank robber to bar his criminal prosecution on the ground that the government has already seized the money he stole during the robbery.

Furthermore, as the court of appeals also explained, a forfeiture of drug proceeds, unlike the fine imposed in *Halper*, is not disproportionate to the amount of the damage caused by the illegal activity. The damage caused by each instance of narcotics trafficking is at least equal to, and quite probably much greater than, the illicit gain garnered by the trafficker.[5] That revenues derived from forfeitures are then used to fund the costs of detection, investigation, and prosecution of drug traffickers, and to reimburse society for the costs of combatting drug abuse and caring for its victims, only reinforces the remedial character of the forfeitures at issue. Cf. *Caplin & Drysdale, Chartered* v. *United*

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[5] In fact, in this case the value of what was forfeited represented only a portion of the total proceeds taken in by petitioners' illegal business over several years. The total forfeiture was therefore far less than the costs that could be attributed to their illegal activity. Pet. App. 9a.

States, 491 U.S. 617, 629 (1989) (noting that government has legitimate interest in forfeiting a criminal's ill-gotten gains to fund a variety of law enforcement activities).

This Court's recent decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), does not change the conclusion that the forfeiture of drug proceeds in the instant case is remedial and nonpunitive. In finding that the forfeiture provisions at issue in *Austin* (21 U.S.C. 881(a)(4) and (7)) constitute punishment for purposes of the Eighth Amendment's Excessive Fines Clause, the Court distinguished its prior holdings concerning the forfeiture of contraband or goods involved in customs violations and noted that the forfeitures in both cases were remedial. 113 S. Ct. at 2811-2812, citing *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (forfeiture of unlicensed firearms discourages unregulated commerce in firearms and removes from circulation firearms used outside regulated channels of commerce), and *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam) (forfeiture of undeclared imported merchandise prevents forbidden merchandise from circulating in the United States, and provides a reasonable form of liquidated damages). The Court also cited the same cases in observing that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial." *Austin*, 113 S. Ct. at 2805 n.4; see also *United States* v. *United States Currency in Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars*, 18 F.3d 73, 75-76 (2d Cir. 1994) (forfeiture of unreported monetary instruments under 31 U.S.C. 5317(c) after criminal conviction for same conduct held remedial, where currency was "the very goods covered

by the regulation," and was therefore "the very *sine qua non* of the crime"), cert. denied, No. 93-1932 (Oct. 3, 1994).

The *Austin* Court did rest its decision in part on the fact that the forfeiture provisions involved in that case (21 U.S.C. 881(a)(4) and (7)) were tied directly to the commission of a drug offense, and on language in the legislative history referring to the inadequacy of the traditional criminal sanctions of fine and imprisonment for deterring and punishing drug offenders. 113 S. Ct. at 2811. The statutory provision at issue in this case, however, while also tied to the commission of a crime, does not seek the kind of penalty that was at issue in *Austin*—the deprivation of property that was in no way unlawful to acquire or possess, and whose value "can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Id.* at 2812 n.14. As the court of appeals reasoned, unlike the heavy penalty imposed in *Halper*, the forfeiture of a portion of petitioners' illegal proceeds "does not punish the defendant because it exacts no price in liberty or lawfully derived property from him." Pet. App. 11a. Accord *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement order following criminal conviction for violation of securities laws not a punishment but remedial only, as it requires defendant to give up only his ill-gotten gains and does not impose an additional penalty, citing the court of appeals' decision in this case).[6]

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[6] Nor is this forfeiture similar to the tax on possession of dangerous drugs, which the Court found was a punishment for double jeopardy purposes in *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994). The Court found it significant that

Moreover, petitioners would have no valid double jeopardy claim even if they were correct in their contention that the forfeiture of drug proceeds amounts to "punishment" in all cases. As this Court's cases recognize, the component of the Double Jeopardy Clause invoked by petitioners here does not prohibit the imposition of punishment *simpliciter*, but only the imposition of "multiple punishments *for the same offense*." *United States* v. *Halper*, 490 U.S. at 440 (emphasis added); *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him *for the same offense* in a separate proceeding") (emphasis added). Whether two offenses are the "same" for double jeopardy purposes does not turn on whether "the same illegal conduct" was involved in both (94-243 Pet. 28), but on a comparison of the elements that the government is required to prove to prevail under each; the offenses are different if each requires proof of a fact that the other does not. See *Blockburger* v. *United States*, 284 U.S. 299 (1932); see also *United States* v. *Dixon*, 113 S. Ct. 2849 (1993) (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)). If the forfeiture provision is considered an "offense" for double jeopardy purposes, that "offense" is not the "same" as the offenses for which petitioners are under indictment.[7]

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the tax in that case was conditioned on commission of a crime, but the tax was also exacted after the drugs had been confiscated and destroyed, and amounted to more than eight times the market value of the drugs. The assessment there clearly went far beyond merely stripping the wrongdoer of the profits of his illicit trade.

[7] The forfeiture "offense" does not require proof that petitioners engaged in narcotics trafficking. See, *e.g.*, *United States* v. *Chandler*, No. 93-2064 (4th Cir. Sept. 27, 1994), slip op. 5 ("It is not

Finally, even if the forfeitures in this case constituted "punishment," the "Double Jeopardy Clause simply is not implicated" if the criminal action is part of the same "proceeding" as the forfeiture action, because in a single proceeding "the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." *United States* v. *Halper*, 490 U.S. at 450; see also *Missouri* v. *Hunter*, 459 U.S. 359 (1983). As the Eleventh and Second Circuits have concluded, for purposes of the Double Jeopardy Clause, "the simultaneous pursuit by the government of criminal and civil sanctions," such as the parallel actions filed by the government in this case, "falls within the contours of a single, coordinated prosecution" for which Congress has explicitly authorized the imposition of dual criminal and civil sanctions. *United States* v. *One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States* v. *Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); but cf. *United States* v. *Torres*, 28 F.3d 1463, 1464-1465 (7th Cir. 1994)

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an element of the government's case to prove the involvement of the property's owner in the commission of the offense giving rise to the forfeiture"). And the narcotics crimes committed by petitioners—conspiracy and possession of a controlled substance with intent to distribute it—do not require proof that petitioners obtained proceeds or anything else of value. See 21 U.S.C. 841(a)(1) and 846. The fact that proceeds were derived from "some form of unlawful activity" is an element of the offense of laundering monetary instruments, see 18 U.S.C. 1956(a)(1), but that offense requires proof of a financial transaction and of the defendant's knowledge of the origin of the proceeds, *ibid.*, and it can be committed even when the property in question represents proceeds of crimes other than narcotics trafficking, see 18 U.S.C. 1956(c)(7).

(suggesting in dicta that parallel administrative and criminal actions constitute separate proceedings).[8]

3. The decision below conflicts with a recent decision by the Ninth Circuit in which that court held that the forfeiture of drug proceeds under 18 U.S.C. 981(a)(1)(A) and 21 U.S.C. 881(a)(6) constitutes a punishment for double jeopardy purposes. *United States* v. *$405,089.23 U.S. Currency*, No. 93-55947 (9th Cir. Sept. 6, 1994). The Ninth Circuit in that case expressly disagreed with the Fifth Circuit's decision in the instant case, and with the Second and Eleventh Circuits' decisions holding that parallel civil and criminal actions of the type at issue here must be considered the same proceeding for purposes of the Double Jeopardy Clause. The Ninth Circuit relied on *Austin* to hold that, without regard to the specific characteristics of the property involved, forfeiture under the statutes at issue here always constitutes punishment. Following its decision in *$405,089.23 U.S. Currency*, the Ninth Circuit examined whether a civil forfeiture under 21 U.S.C. 881(a)(4)

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[8] As the Second Circuit recognized in *Millan* (2 F.3d at 20), the prohibition against imposing multiple punishments in successive proceedings is based on the concern that the government "is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States* v. *Halper*, 490 U.S. at 451 n.10. That concern is not present where, as here, the criminal prosecution is initiated before any adjudication of the parties' rights in the civil forfeiture action. To the contrary, permitting a claim of double jeopardy where, as here, the defendant has voluntarily settled or otherwise terminated a forfeiture action with full knowledge of the pendency of related criminal charges, and when he has failed successfully to bargain for dismissal of those charges, raises many of the same concerns that have led this Court to prohibit the use of double jeopardy claims "as a sword." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984) (citing *Jeffers* v. *United States*, 432 U.S. 137 (1977)).

and (7) should be considered the "same offense" as factually related criminal offenses, and it answered that question in the affirmative, reasoning that "[b]ecause those sections incorporate the elements of criminal offenses, forfeitures pursuant to them constitute a species of greater offenses with respect to the lesser-included offenses that form the bases of the forfeitures." *United States* v. *One 1978 Piper Cherokee Aircraft*, No. 92-15350 (9th Cir. Sept. 30, 1994), slip op. 11849, 11862.[9]

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[9] Petitioners also allege (94-231 Pet. 11; 94-243 Pet. 18-19) a conflict with an earlier Fifth Circuit decision, *Wood* v. *United States*, 863 F.2d 417, 421 (1989), in which a panel of that court stated that "[f]orfeiture cannot seriously be considered anything other than an economic penalty for drug trafficking." The issue in that case, however, was whether a taxpayer was entitled to a loss deduction for money forfeited as proceeds of drug smuggling, and the court made the quoted statement in discussing whether there was a public policy rationale for denying the deduction. Whether a forfeiture is a "punishment" for double jeopardy purposes is a distinct question that was not before the court in *Wood*. In any event, any conflict between decisions of the same court is a matter for resolution by the court of appeals itself, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Petitioners also cite (94-231 Pet. 15-16; 94-243 Pet. 20-22) two state cases, *Fant* v. *State*, 881 S.W.2d 830 (Tex. Ct. App. 1994), review granted, No. 1047-94 (Tex. Oct. 12, 1994), and *State* v. *1979 Cadillac Deville*, 632 So. 2d 1221 (La. Ct. App. 1994), writ granted, No. 94-C-1077 (La. Sept. 23, 1994), which they contend conflict with the decision below. Only *Fant* v. *State*, however, reached a broad holding that forfeiture under a statute similar to the federal law at issue here always constitutes a punishment for double jeopardy purposes; *State* v. *1979 Cadillac Deville* held only that the forfeiture of the claimant's automobile was not remedial because the property was only an instrumentality and not contraband. In any case, neither of those decisions is from the highest court of the State and in each of them further review has been granted by the

We believe that the Ninth Circuit's reading of *Austin* is incorrect, and that its conclusions concerning the definition of "multiple proceedings" and the elements of the forfeiture "offense" are erroneous. The Ninth Circuit also departed from *Halper*'s directive to make a "particularized assessment" of "the sanction as applied in the individual case." 490 U.S. at 447-448. The court's interpretation of the rule of *Halper*, which was explicitly reserved for "the rare case" (*id.* at 449), expansively applies it to virtually every case in which the government seeks a civil forfeiture of a drug defendant's proceeds. See Pet. App. 19a; see also *United States* v. *One 1978 Piper Cherokee Aircraft*, No. 92-15350, slip op. 11863 (Rymer, J., concurring) (disagreeing with *$405,089.23 U.S. Currency*, but concurring "only because I am constrained to follow" it as circuit precedent).

The conflict between the Ninth Circuit's decisions and those of other courts may warrant this Court's attention, but the issue is not presently ripe for review by this Court. The government has filed a petition for rehearing and a suggestion for rehearing en banc in *$405,089.23 U.S. Currency*. It is possible that the conflict will be resolved through the en banc process, thus obviating the need for this Court's review.[10] Moreover, because petitioners have not been tried on the pending indictments, they will have an opportunity to seek this Court's review of their "multiple punishments" claim in the event review is now denied and they are ultimately convicted.

State's highest court. Those decisions therefore do not represent a final resolution of the issues binding on all the courts of the State.

[10] As shown by *One 1978 Piper Cherokee Aircraft*, the correctness of *$405,089.23 U.S. Currency* has already been called into question by one of the judges in that circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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